Pacific FM, Inc. d/b/a KOFY, Operator of KOFY TV-20 ***and*** **Helen Emile Perry, Frank Pappas III, and Brian Shimetz.** Cases 20–CA–27232, 20–CA–27355, and 20–CA–27411

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On November 18, 1997, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent and the General Counsel filed exceptions, briefs, and answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

1. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by discharging Helen Perry on April 29, 1996.[4] In finding that the Respondent knew of Perry's support for the Union, the judge relied in part on statements she made to Program Manager/Director Michelle Ball, Public Service Announcement Director Carole Fertick, and Business Manager Michelle Mattea. The Respondent correctly contends that none of these individuals were alleged in the complaint to be supervisors and that their status was not litigated at the hearing. The Respondent therefore argues that their knowledge cannot properly be attributed to the Respondent. We do not rely on this aspect of the judge's decision.[5] In adopting the judge's finding that the Respondent was aware of Perry's union sentiments, we rely instead on the following.

In late January, the Respondent's president, James Gabbert, called Perry into his office and interrogated her about her union sympathies, in response to which Perry told Gabbert that she was tending toward supporting the Union. On February 9, at a preelection captive-audience speech by Gabbert, Perry was one of only a few employees that spoke up in response to Gabbert's solicitation of grievances. Perry complained that she was working too many holidays and was entitled to greater pay for this effort. She was vehement on the issue of working on holidays, to the point of stepping up to Gabbert's display board and using it to illustrate her point. It is clear that Perry's complaint did not escape Gabbert's attention, for he admittedly responded by declaring that he could have fired her for an incident occurring years earlier. As the judge found, Perry's advocacy and willingness to confront Gabbert in front of other employees would likely identify her as one of the employees dissatisfied with the status quo and cause Gabbert to perceive her as a union supporter. Accordingly, based on this evidence, we find that the Respondent knew of (or at least suspected) Perry's prounion sympathies at the time it discharged her.[6]

Contrary to our dissenting colleague, we also agree with the judge that the Respondent has not established a meritorious defense to the complaint allegation that Perry's discharge violated Section 8(a)(3) and (1) of the Act. The dissent does not dispute that the General Counsel demonstrated that the Respondent's strong antiunion animus was a motivating factor in the decision to discharge Perry. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(3) by discharging Frank Pappas.

[3] We shall conform the judge's recommended Order to his unfair labor practice findings by providing that the Respondent shall cease and desist from discharging or constructively discharging employees because of their union or other protected concerted activities.

The judge has used the broad "in any other manner" cease-and-desist language in his recommended Order. We have considered the case in light of the standard set forth in *Hickmont Foods*, 242 NLRB 1357 (1979), and have concluded that the narrow "in any like or related manner" language is appropriate.

[4] All subsequent dates are in 1996.

[5] The Respondent has also excepted to the judge's finding that Karen Provenza was a statutory supervisor. On the basis of that finding, the judge attributed to the Respondent Provenza's knowledge of Perry's union activities. We find it unnecessary to resolve the issue of Perry's supervisory status. As discussed infra, there is other evidence in the record supporting the judge's finding that the Respondent was aware of Perry's prounion sentiments.

We recognize that the General Counsel has excepted to the judge's failure to find that Brian Shimetz was constructively discharged and that the General Counsel relies on certain testimony by Provenza as an admission that the Respondent reassigned Shimetz to the prime time shift to force him to quit. However, even though the judge considered Provenza's testimony to be an admission against the Respondent's interest, he still found (and we agree) that the General Counsel failed to establish that Shimetz was constructively discharged. Therefore, even if we were to find, in accordance with the General Counsel's position, that Provenza was a supervisor, we would still adopt the judge's recommendation to dismiss the complaint with respect to Shimetz.

[6] See, e.g., *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990), enfd. mem. 940 F.2d 661 (6th Cir. 1991) ("The Board and the courts have long held that when the General Counsel proves an employer suspects discriminatees of union activities, the knowledge requirement is satisfied.").

989 (1982). Rather, our dissenting colleague contends that the Respondent successfully met its *Wright Line* burden of establishing that it would have discharged Perry even absent her union activities. We do not agree.

The dissent focuses on the judge's finding that the incident for which Perry was allegedly discharged "was made more serious" because it occurred during a "sweeps" period. Our colleague states that this finding "should be the end of the analysis" and that the judge ignored his own finding to substitute his own business judgment for that of the Respondent. We believe our colleague invests the judge's finding with more meaning than the judge intended.

The judge's finding was simply a general statement about the industry in which the Respondent operates. It is, no doubt, a serious matter when the audio portion of a television program is interrupted, and, no doubt, even more serious when it occurs during a "sweeps" period.

This truism is all that the judge was acknowledging when he accepted the Respondent's contention about the seriousness of the incident for which Perry was allegedly discharged. To put this in a legal framework, the judge accepted that the Respondent has shown a business reason for the discharge. But that is not the end of the analysis. As the judge stated, quoting *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981), "the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination."

In making his finding that the Respondent's actual motive for discharging Perry was discriminatory, the judge detailed the evidence of Respondent's history of discipline. The record, in fact, disclosed numerous serious operator errors, including improperly threading a tape which broke while being played on the air; rewinding a tape while the show was on the air, thereby ruining the illusion that the show was live; forgetting to activate the radio transmitter, resulting in a loss of audio; recording a program on a tape already containing a prerecorded program; violating Federal Communication Commission regulations regarding the number of allowable commercials during children's programming, which prompted a special station meeting; playing the wrong commercials; leaving the master control booth unattended, resulting in a minute or two of black air; forgetting to activate the station's Spanish translation signal; in the words of president Gabbert, "totally fuck[ing]" up a shift on two occasions; and permitting several minutes of dead airtime. None of the operators responsible for the above incidents were terminated.[7]

In arguing that the Respondent showed it did not treat Perry disparately, the dissent points to the Respondent's treatment of employees Rob Barry and Jeremy Flint. Even assuming that the Respondent's treatment of Perry was similar to the treatment of Barry and Flint,[8] we would still find that the Respondent failed to show it would have discharged Perry absent her union activities. For, given the General Counsel's significant evidence of disparate treatment, it is not sufficient that the Respondent can show some examples of similar treatment. Rather, the Respondent must prove that the General Counsel's instances of disparate treatment "were so few as to be an anomalous or insignificant departure from a general consistent past practice." *Avondale Industries*, 329 NLRB 1064, 1067 (1999).

The Respondent has not done so. In addition to the General Counsel's significant evidence of disparate treatment, we find the Respondent admitted its willingness to tolerate serious misconduct. Thus, in response to questioning from the Respondent's attorney, Gabbert stated that he told employees "to get fired or terminated at this television station you essentially have to kill somebody."

Taking into account the General Counsel's evidence and Gabbert's admission, we find that, at best, the Respondent has shown that it "may, or may not, have [discharged Perry absent her union activities], i.e., the record of disciplinary action is mixed." See id. at 1064, 1067 Therefore, we conclude that the Respondent has failed to meet its *Wright Line* burden, and we affirm the judge's finding that the Respondent's discharge of Perry violated Section 8(a)(3) and (1) of the Act.

2. Contrary to our dissenting colleague, we also agree with the judge's finding that the Respondent violated Section 8(a)(1) by announcing a new employee break policy.[9]

At a February 9, 1996 mandatory meeting with employees, the Respondent unlawfully solicited grievances

[7] O'Dell Williams, the operator who permitted the dead airtime, was eventually discharged after he locked himself out of the station and broke a window to get back in.

[8] With respect to Barry, the judge found the treatment dissimilar because Barry was not, in fact, discharged. Rather, he was allowed to resign. We, too, find that difference significant. In addition, we give somewhat less weight to the 1986 or 1987 Barry incident, in light of the many intervening incidents for which employees were not discharged. With respect to Flint, the incident for which he was discharged occurred after Perry's discharge. Further, the record shows that Flint was a trainee.

[9] Although the judge found this violation, he omitted any reference to it in his conclusions and law and recommended Order. We shall modify the conclusions of law and recommended Order accordingly.

and impliedly promised to remedy them. Breaktimes for Master Control Operators (MCOs) was one of the grievances discussed. MCO Frank Pappas, who raised the break grievance, said that breaks were being required at the beginning and end of the shifts rather than in the middle. Pappas testified that he had raised this issue on two occasions before the start of the organizing campaign. Management told him on those occasions, "[T]hat's tough," and that the matter was nonnegotiable. When Pappas raised the break issue in the campaign meeting, however, Gabbert agreed to remedy the matter. On February 13, the day of the election, the Respondent did so by posting a memo stating that the Respondent "wish[ed] to conform with the law" and announcing a new policy of scheduling breaks approximately halfway through each 4-hour work period.

Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights. *Yale New Haven Hospital*, 309 NLRB 363, 366–367 (1992). Our dissenting colleague would find that the Respondent simply sought to comply with state law as expeditiously as possible after learning from an employee that it was not in compliance.

First and most significantly, even assuming arguendo that the Respondent was attempting to comply with state law, it has offered absolutely no explanation for why it had to announce the change in break policy on the very day of the election. As the judge correctly pointed out, the Respondent granted the benefit "in time for employees to take note before they voted." There can be no other explanation. In any event, it is true that Pappas asserted that the Respondent reasonably believed that it was not in compliance with state law. The Respondent, however, repeatedly denied Pappas' contention until the election campaign when Gabbert stated to Perry, "If there's something wrong, fix it."

The Respondent introduced no evidence that its preelection break policy did not comply with state law. Indeed, as stated above, the Respondent repeatedly denied Pappas' claim that the preelection break policy violated state law. Further, as to the actual practice, the Respondent's witnesses testified that the MCOs had always been allowed to schedule breaks during their shifts at times of their own choosing. We find nothing in their testimony that could raise a question about noncompliance with state law. Finally, the Respondent's position statement admitted that several months after the election, the Respondent reverted to the preelection break policy, thereby casting further doubt on its assertion that the election-day change was motivated by a good-faith effort to comply with state law.

At most, the evidence shows that *employee Pappas* believed the Respondent's preelection break policy did not comply with state law. This is a far cry from the evidence necessary to establish that *the Respondent* reasonably believed that its preelection break policy did not comply with State law.

Accordingly, for all these reasons, we find that the Respondent failed to establish a legitimate business reason for the timing of the change in the break policy, and we adopt the judge's finding that the Respondent violated Section 8(a)(1).

AMENDED CONCLUSION OF LAW

Substitute the following for paragraph 4(a).

"(a) Prior to the election, soliciting grievances with the express or implied promise of remedying them, and in fact remedying grievances by announcing a new employee break policy."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pacific FM, Inc. d/b/a KOFY, Operator of KOFY TV-20, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Prior to an election, soliciting grievances from employees with the express or implied promise of remedying them, or in fact remedying grievances by announcing a new employee break policy,"

2. Substitute the following for paragraphs 1(h) and (i).

"(h) Discharging or constructively discharging employees on account of their union activities or other protected concerted activities.

"(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employee Helen Perry and by announcing a new break policy for master control operators (MCOs). The Respondent has excepted to the judge's findings. Contrary to my colleagues, I find merit in the Respondent's exceptions.

The factual background from which the alleged violation arises is as follows. The Respondent operates, inter

alia, KOFY, TV-20, a television station in San Francisco, California. James Gabbert is the Respondent's principal stockholder and president. John Perry (no relation to Helen Perry) is the Respondent's technical operations manager for KOFY. KOFY has about 80 to 90 employees, approximately 20 of whom are in the engineering/production unit at issue here. Included in the unit are master control operators (MCOs), whose responsibilities include monitoring the programs and commercials scheduled to air on their shifts.

The MCOs work at the KOFY station in San Francisco. However, the Respondent maintains its television transmitter equipment on Mount Sutro, a few miles from the KOFY station. The Respondent has two transmitters on Mount Sutro. If there is a problem with the transmitters that results in the loss of picture or sound, the MCOs must "Multiplex," i.e., use a system of remote controls to correct the problem on a temporary basis until an employee, usually Chief Engineer Steve Coulam, can go to Mount Sutro to work on the transmitters.

In January 1996,[1] the Union submitted a petition to the Board requesting that an election be held in a unit consisting of the Respondent's engineering/production department employees. On February 9, 4 days before the election, the Respondent President Gabbert held a mandatory meeting for unit employees. At the conclusion of his remarks, Gabbert asked for comments or questions.

In response, many employees, Helen Perry among them, raised grievances. Perry complained that she was working too many holidays and was therefore entitled to higher pay. She also expressed unhappiness that John Perry had not granted her time off to deal with flood damage at her home and had publicized a medical problem of her son. Gabbert responded by mentioning that Helen Perry could have been fired several years before for a rules infraction.[2] MCO Pappas complained that MCOs were being required to take their breaks at the beginning and end of their shifts rather than in midshift. To all the grievances raised by Helen Perry, Pappas, and other employees at the meeting, Gabbert said that he would either look into them or take care of them.

1. Discharge of Perry

The Respondent discharged Helen Perry on April 29. I assume arguendo that the General Counsel has established a prima facie 8(a)(3) case as to this discharge. However, I conclude that Respondent established a meritorious defense. The facts concerning that defense are set forth below.

The Respondent hired Helen Perry as an MCO in May 1992, assigned her to the prime time MCO spot in 1993 or 1994, and designated her as the alternate chief MCO in November 1994. Notwithstanding these assignments, the judge found that Perry's tenure with the Respondent was "checkered to say the least." In this regard, shortly after Perry was hired, during a test of her knowledge of MCO duties, she was unable to respond correctly to questions regarding the operation of the "hot line" phone in the master control booth and the meaning of "multiplex" (i.e., the system used to remedy an audio failure during a broadcast). Perry "made other mistakes and committed other infractions" as time went on. As already noted, in November 1992, the Respondent reprimanded Perry for violating its security policy by allowing a nonemployee into the building to use the restroom on two occasions. In February 1993, Perry aired an introduction for the wrong television program. John Perry reprimanded Helen Perry for this mistake and warned her that this and other errors could not continue. On May 26, 1994, Perry allowed a blank screen to air for 7 minutes. The judge found that the latter error was of major concern for the Respondent, because it would cause viewers to turn to other channels, resulting in reduced viewership and a consequent adverse impact on advertisers' willingness to place ads on KOFY-TV. Accordingly, John Perry issued Helen Perry a stern written reprimand for this incident and recommended that she be dismissed. The recommendation was overruled.

Finally, during Helen Perry's MCO shift on April 26, 1996, at approximately 12:30 a.m., the audio portion of the program in progress, an "infomercial" for Father's Day tools, failed and was replaced by a hissing noise for approximately 7 minutes. The Respondent did not blame Helen Perry for the initial audio failure, but did fault her for not taking certain standard steps to remedy the problem immediately. That is, Perry failed to follow established procedure by neglecting to page Chief Engineer Coulam when she could not reach him by phone, and by not "multiplexing" so that the audio could be restored. The Respondent terminated her following this incident.

In its April 29 termination letter, the Respondent advised Perry that the April 26 incident was a serious one that she could have averted by following established procedures. The letter also referred to Helen Perry's May 1994 infraction and advised her that her failure to follow correct procedures cost the station viewers and also "cost the station in lost paid-programming on the very first night of the ratings sweep." Helen Perry did not dispute

[1] All dates are in 1996, unless otherwise stated.

[2] As discussed below, this was a reference to an instance when, in violation of the Respondent's security policy, Helen Perry admitted her fiancé into the station to use the restroom.

these statements, and acknowledged that she had made a mistake.

In evaluating the seriousness of Helen Perry's mistake, the judge accepted the Respondent's contention that the seriousness of the April 26 incident was exacerbated by its occurrence during the "sweeps" period when audience viewing is measured. Although the judge found it unlikely that the infomercial then being shown was measured for audience viewing, he found that Perry made a serious mistake and that the Respondent suffered financial losses as a result. Further, the judge found that Helen Perry had made mistakes in the past, and had almost been discharged for her mistake in 1994.

The judge concluded that the decision whether Helen Perry should have been terminated for her mistake was "as a general rule, a business judgment which only Respondent is capable and qualified to make." In my view, the judge should have then followed his own admonition. Instead, he proceeded to depart from it. More particularly, the judge went on to set forth his own view that Perry's mistakes constituted "a relatively nonserious offense." It is clear that the judge thus simply substituted his own business judgment for that of the Respondent. He should not have done so.[3] The judge then compounded his error by finding, without support in the record, that the Respondent "distorted and magnified" Helen Perry's deficiencies.

My colleagues say that I have "invest[ed] the judge's finding with more meaning than the judge intended." They opine that the judge was simply making "a general statement about the industry in which Respondent operates." In my view, this reinterpretation of what the judge said does not aid the judge or my colleagues. Just as the judge has no role in making disciplinary decisions for the Respondent, so it is that "the industry" has no role in making those decisions. Those decisions are for Respondent to make.

The judge concluded that the Respondent's asserted reasons for discharging Perry must have been "pretextual," and that the real reason for discharging her must have been her protected concerted activities. Because this conclusion was based on a flawed analysis, it should not be affirmed.

In further support of his finding of pretext, the judge found that (1) the timing of Perry's discharge was suspect because it closely followed her protected concerted activities; (2) the Respondent had not discharged others who had committed similar offenses; and (3) the Respondent could not rely on Perry's past serious infractions in discharging her because it had condoned those past infractions by appointing her alternate chief MCO in November 1994. In my view, the judge's analysis is flawed and does not support a finding that the Respondent's reasons for discharging Perry were pretextual.

As to timing, the Respondent terminated Helen Perry only after her serious mistakes of April 26. This was over 2 months after the Union lost the election and after Perry had voiced her grievances at the February 9 employee meeting. I cannot agree, therefore, that Perry's April 26 discharge "followed closely" her protected concerted activities. Rather, it "followed closely" her performance errors of April 26.

Further, the judge's analysis implies that Perry, was one of the most active union supporters, and was singled out for termination, as part of a plan to get rid of the most active union supporters. The record, however, does not support such a conclusion. Perry was far from the most forceful and public of union supporters. Her union activities were limited to engaging in personal discussions about the Union with fellow employees. In contrast, union activist Brian Shimetz solicited authorization cards and posted union literature through the Respondent's facility. However, he continued at all relevant times to be viewed by the Respondent as a valued employee. The difference between Shimetz and Perry is that Shimetz did not have a history of poor work performance, as did Perry and others discharged by the Respondent for similar reasons. The only "plan" evident from the record is one against continuing to employ individuals who are unable to meet the Respondent's reasonable performance standards. Thus, I cannot agree that the Respondent targeted Perry for discharge as part of an effort to get rid of the most active union supporters.

As to the Respondent's alleged disparate treatment of Helen Perry, there is evidence that the Respondent permitted an employee, Rob Barry, to resign in lieu of being

[3] See *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956), where the court stated:

> But as we have often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.

See also *Reno Hilton*, 282 NLRB 819, 837 fn. 41 (1987), where the Board stated:

> The Board has properly cautioned that when deciding a case requiring examination into an employer's motives in a given transaction, we should take pains not merely to substitute our own business judgment—nor our abstract sense of fairness—for that which the employer may apply day to day. Rather, we must judge the employer's actions by reference to the "standard[s] which [the employer] has set for itself," as those standards may be evident from past practice or other circumstantial indications. *FPC Advertising*, 231 NLRB 1135, 1136 (1977).

discharged for permitting a blank airtime during an incident in 1986 or 1987. The record also establishes that the Respondent discharged employee Jeremy Flint for the same reason. Thus, contrary to the judge's finding, the Respondent has effectively discharged employees for performance errors similar to Perry's. Therefore, I find that the Respondent's discharge of Helen Perry does not establish disparate treatment.

My colleagues set forth a laundry list of other errors by other employees, which errors did not lead to discharge. However, none of them is similar to Perry's error (in terms of what happened and the critical time at which it happened). Further, as noted above, Perry was a repeat offender.

The majority also notes that Respondent's president, Gabbert, testified that "to get fired or terminated at this stations, you essentially have to kill somebody." That this testimony was hyperbole is shown by the fact that Respondent has discharged employees (or permitted them to resign in lieu of discharge), without their having killed anyone.

Finally, as to the issue of condonation, the judge, citing *Virginia Mfg. Co.,* 310 NLRB 1261 (1993), enfd. mem. 27 F.3d 565 (4th Cir. 1994), found that the Respondent condoned Helen Perry's past infractions by appointing her alternate chief MCO. The judge erred. As explained in *Virginia Mfg. Co.,* 310 NLRB at 1272:

> Condonation of unprotected activity will not be readily inferred, but must be based on clear, convincing, and positive evidence that the employer has agreed to forgive such misconduct and desires to continue the employer-employee relationship as though no misconduct had occurred. The Board does not look for any magic words suggesting the forgiveness, but it examines whether all the circumstances establish clearly and convincingly that the employer has agreed to "wipe the slate clean" respecting any employee misconduct.

I cannot agree with the judge that the Respondent's mere appointment of Perry as the alternate chief MCO, standing alone, supplies "clear, convincing, and positive evidence" that the Respondent forgave Perry's past infractions and evidenced an intent to ignore Perry's past mistakes in evaluating any future mistakes. Accordingly, I find that the Respondent could evaluate, as it did, Perry's April 26 mistakes in light of her past infractions.

Thus, assuming, without deciding, that the General Counsel has met its *Wright Line* burden of establishing a prima facie case that Perry was discharged because of her union activities, I would find that the Respondent has successfully rebutted that prima facie case by showing that its reasons for discharging Perry were not pretextual. Rather, they were legitimate reasons arising from the exercise of business judgment which only the Respondent was capable and qualified to make. Thus, it was for the Respondent, not the judge, to decide the seriousness of Perry's mistakes. That the Respondent has consistently viewed offenses such as Perry's April 26 mistake as serious and warranting discharge is supported by the fact that the Respondent has terminated other employees for similar infractions in the past. Further, in deciding whether to discharge Perry, the Respondent could, and did, take into account Perry's past infractions. Thus, I would find that the Respondent's reasons for discharging Perry were not pretextual and that therefore the Respondent has successfully met its *Wright Line* burden of rebutting the General Counsel's prima facie case. Accordingly, I would reverse the judge and dismiss this allegation.

2. Announcement of new break policy

On December 15, 1995, MCO Pappas complained to Technical Operations Manager John Perry and Production Manager Jeff Giles regarding the Respondent's practice of requiring MCOs to take their breaks at the beginning and end of their shifts rather than in midshift. The Respondent did not then change the practice.

Shortly before the Respondent's February 9 preelection meeting with employees, Pappas posted at the Respondent's facility a copy of a California wage order covering, among other subjects, rest period requirements for employees in the broadcast industry. Record evidence suggests that this posting was the first time that Pappas registered his complaint about the Respondent's break practice in terms of California law. Pappas testified that he posted the wage order because he wanted to make certain that KOFY complied with its terms. In particular, Pappas wanted KOFY to comply with the rest period, or break, requirements set out in the wage order which required employers to authorize and permit their employees to take rest periods, insofar as practical, in the middle of each work period. Subsequently, as noted above, during the February 9 meeting, in response to Station Owner Gabbert's solicitation of employee grievances, Pappas complained about the Respondent's break practice. After that meeting, Pappas met with Gabbert and John Perry regarding compliance with the California wage order's break requirement.

On February 13, election day, the Respondent issued a memorandum announcing a new MCO schedule. The announcement stated, inter alia, "[t]his new schedule also includes rest-periods (breaks) shown, approximately halfway through each 4-hour work period." The judge found that the Respondent remedied Pappas' grievance "in time for employees to take note before they voted." Thus, the judge concluded that the Respondent violated

Section 8(a)(1). I disagree, and I would reverse the judge's finding.

Pappas testified without contradiction that shortly before the February 9 meeting he posted a California wage order for the broadcast industry at the Respondent's facility. He questioned the Respondent's break policy during an employee meeting and thereafter met with officials to discuss the Respondent's noncompliance with the wage order. Since Pappas' alleged grievance was no more than a request that the Respondent comply with the law, I cannot find that the Respondent's remedying of that grievance—i.e., its prompt action to comply with the law, upon learning of its noncompliance—somehow constitutes a grant of benefit in violation of Section 8(a)(1).

In my view, where an employer is not in compliance with the law and an employee brings this noncompliance to the employer's attention, it is incumbent upon the employer to come into compliance with the law as expeditiously as possible. That is all that the Respondent did here. Further, even if the employer learns of its noncompliance during a union campaign, the presence of the union should not convert compliance with the law into an unlawful grant of benefit. To hold otherwise would permit an employer to use the union campaign as an excuse for continued noncompliance and would be contrary to the Board's "general rule" that an employer should act as if the union were not in the picture.[4]

Contrary to my colleagues, I find that Pappas's posting of a California wage order prior to the February 9 meeting provided the Respondent with a legitimate business reason for changing its break policy. Clearly, the Respondent, faced for the first time with a copy of the state wage order, believed that it was not in compliance with the law and undertook, consistent with its legal duty, to "fix it." Contrary to my colleague's contention, in Pappas' break policy discussions with Respondent prior to February 9, there is no evidence that the discussion took place in the context of state legal requirements for break scheduling. Faced with the posted California wage order, the Respondent believed that it had a duty to comply.

My colleagues say that Respondent, in order to prevail as to this allegation, had to show that it was not in compliance with the law before it made the change. I disagree. It is enough for Respondent to show a legitimate concern that it was not in compliance, and that a change would therefore be prudent. Finally, I would not imply bad faith, on the Respondent's part, from the fact that several months later Respondent changed its break policy again. The reasons for the change are not explained in the record. The burden is on the General Counsel to establish a violation of the Act.

Since the Respondent, in effect, followed the Board's Rule here by taking immediate steps to come into compliance with the law, I cannot agree with my colleagues that the Respondent's good-faith efforts to obey the law constitute a violation of Section 8(a)(1). Accordingly, I would dismiss this allegation.

[4] As the Board explained in *Great A&P Tea Co.,* 166 NLRB 27, 29 fn. 1 (1967):

> As a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture. On the other hand, if an employer's course of action is prompted by the Union's presence, then the employer violates the Act whether he confers benefits or withholds them because of the Union.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prior to an election solicit grievances with the express or implied promise of remedying them, and we will not in fact remedy grievances by announcing a new employee break policy.

WE WILL NOT blame the union organizing campaign for delayed pay raises.

WE WILL NOT coercively interrogate you about your union activities or other protected concerted activities.

WE WILL NOT disclose to employees prior to the election our plan for the future to implement a 401(k) plan.

WE WILL NOT misstate labor law to indicate futility of supporting the Union.

WE WILL NOT threaten to move production to another area, to subcontract work performed by unit employees, and to lay off 12 employees if you select the Union.

WE WILL NOT tell you it would be futile to support the Union because we would never sign a contract.

WE WILL NOT discharge or constructively discharge you on account of your union activities or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Helen Perry and Frank Pappas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without

prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Helen Perry and Frank Pappas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Helen Perry and Frank Pappas, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

PACIFIC FM, INC. D/B/A KOFY OPERATOR OF KOFY, TV-20

William Baudler, Esq., for the General Counsel.

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Helen Emilie Perry, Esq., of San Francisco, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at San Francisco, California, on March 17, 18, 20, 21, 26, 27, and 28, 1997,[1] pursuant to a second amended consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 20 on January 9, and on February 25, 1997 (amendment to second amended consolidated complaint), and which is based upon charges filed by Helen Emilie Perry (Case 20–CA–27232), by Frank Pappas III (20–CA–27355), and by Brian Shimetz (Case 20–CA–27411) (the Charging Parties or Helen Perry, Pappas, or Shimetz, respectively) on May 1 (Case 20–CA–27232), on July 16 (Case 20–CA–27355), and on August 26 (Case 20–CA–27411). The complaint alleges that Pacific FM, Inc. d/b/a KOFY, Operator of KOFY TV-20 (called Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

ISSUES

1. Whether Respondent violated Section 8(a)(1) of the Act by committing one or more of the following acts:

(a) By soliciting employee complaints and grievance, thereby impliedly promising its employees increased benefits and improved terms and conditions of employment if employees refrained from union organizing activity.

(b) By canceling production of the Jim Gabbert Show scheduled for election day in order to encourage votes against the Union in the election.

(c) By informing its employees that pay raises were not possible because they had engaged in a union organizing drive.

(d) By interrogating its employees regarding their support for the Union.

(e) By informing its employees that it was implementing a new 401(k) plan to encourage employees to vote against the Union.

(f) By telling employees that Respondent would bargain with the Union for a year, after which employees would have to vote again on whether they desired to keep the Union.

(g) By telling employees that if they selected the Union as their exclusive collective-bargaining representative, Respondent would no longer be able to provide employees with beer in connection with the taping of the Jim Gabbert Show.

(h) By informing employees that it was implementing a new employee break policy to encourage employees to vote against the Union.

(i) By informing employees that it intended to move production to Marin County, California and could subcontract work performed by the production employees resulting in the layoffs of 12 employees, if employees selected the Union as their collective-bargaining representative.

(j) By informing employees that it would be futile for them to select a union as their collective-bargaining representative because Jim Gabbert would never sign a collective-bargaining agreement.

2. Whether Respondent discharged Helen Perry and constructively discharged Pappas and Shimetz, because these three employees assisted the Union and engaged in concerted activities and/or to discourage employees from engaging in these activities.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation which operates a television station and radio stations with an office and place of business located in San Francisco, California. Respondent further admits that during the past calendar year, ending December 31, in the course and conduct of its business, that its gross revenues exceeded $100,000 and belongs to, subscribed to, or utilized interstate news services and advertised national brand products. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that National Association of Broadcast Employees and Technicians Union, Local 51, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein refer to 1996 unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Overview

In early 1996, the Union submitted a petition to the Board requesting an election for a unit described as:

> All full–time and regular part–time employees employed by the Employer in the Engineering/Production Department; excluding all other employees, guards and supervisors as defined in the Act. [GC Exh. 7.]

A Stipulated Election Agreement followed setting the election for February 13 on the Employer's premises (GC Exh. 5). A document in the record identified the parties' election observers: for the Employer, Michele Mattea, "bookkeeper" (In her testimony as Respondent's witness, Mattea described her title as "Business Manager." In a list of Respondent employees, Mattea is described as "Accounting Manager" (R. Exh. 36)); for the Union, Frank Pappas, the General Counsel's witness and alleged discriminatee (GC Exh. 4). The tally of ballots reflects the election results: 9 votes for the Union and 10 votes against the Union with one ballot challenged (insufficient to affect the results (GC Exh. 3)).

The Union filed no objections and did not participate in the hearing. Contrary to Respondent's argument made during the hearing (Tr. 1359–1360), I cannot and will not speculate as to the Union's absence from the case. Accordingly, I draw no inference which may support Respondent's theory.

After the election, three of Respondent's employees left their employment: Helen Perry was terminated and Frank Pappas and Brian Shimetz resigned. To varying degrees, all three were union organizers and/or union supporters in the organizing campaign which preceded the election. The complaint alleges that all three separations violated the Act, the latter two by constructive discharge. Respondent, on the other hand, contends that Helen Perry was terminated for ample cause, and the other two voluntarily resigned for reasons unrelated to the Union, the election, or any other protected concerted activity.

After his resignation, Pappas filed a lawsuit against Respondent in the Superior Court of San Francisco County. containing many of the same allegations found in the instant case, Pappas' state court lawsuit allowed Respondent discovery rights which would not normally have been available to a Respondent in a Board unfair labor practice case. In fact, about 2 weeks before the present case began, Respondent deposed Pappas whose testimony is contained in five volumes. As of this writing, I have not been informed of any result in Pappas' lawsuit and I drawn no inference from its existence.

2. Background on Employer

Respondent's corporate empire includes not only KOFY, TV-20 which is the subject of this case, but in addition three Bay Area radio stations as well (one through lease). Its headquarters is located in a two-story building in an industrial area of San Francisco. There the technical, production and administrative functions associated with the television station are conducted. A few miles away from the station, on Mount Sutro, Respondent maintains its television transmitter equipment. The primary transmitter, called the Townsend, has three components: one to transmit sound and two to transmit pictures. A backup transmitter, called the Ampex is also maintained at the same location. Because Respondent broadcasts TV-20, 24 hours per day, 7 days per week, the two transmitters are necessary so that any weather, electrical, or other contingency will not interrupt operation of TV-20. Other local TV stations also maintain their transmitters on Mount Sutro, so the location is kept secure and not open to the public.

As it would be impractical for Respondent's employees to visit Mount Sutro when a problem occurs, the station maintains two remote controls available to employees. The primary remote control, called a Moseley and the secondary remote control called a TFT are used in the event of loss of picture and/or sound. As Helen Perry was terminated over her performance of duty in dealing with a 7-minute loss of sound and her attempt to remedy the problem, I will return to this subject below. For now, it suffices to say, that in some cases, it is necessary for a Respondent employee to go to Mount Sutro, either to install new equipment, to perform routine maintenance, or to remedy a problem which cannot be resolved through use of the remote controls kept at the station. When an employee does visit Mount Sutro, it is usually Steve Coulam, Respondent's chief engineer and a Respondent witness at hearing.

Respondent's president and 85-percent stockholder is James Gabbert. Gabbert is also a well-known Bay Area television personality, appearing on a weekly TV-20 Sunday night show called, "Late Nite with James Gabbert" and on other less frequent shows. Gabbert is the focus of the allegations in the complaint and testified extensively as Respondent's witness, primarily to deny all or most of the charges against him. Regrettably, I will be unable to credit key portions of his testimony. Respondent's general manager and minority owner is Mike Lincoln, who did not testify and played no significant role in the facts of this case. The day-to-day operation of TV-20 is managed by John Perry—no relation to Helen Perry—a Respondent employee since 1972 and currently technical operations manager. Like Gabbert, John Perry played a major role in the facts of this case and testified extensively as Respondent's witness.

A document was received into evidence listing the various departments at Respondent besides the unit involved in the election. For example, there is programming, traffic (deals with scheduling of commercials), promotions, accounting, and engineering (R. Exh. 36). About 20 employees are in the engineering/production unit and 60 to 70 employees work elsewhere. Approximately 25 other employees work at each of the three radio stations owned or controlled by Respondent.

KOFY, TV-20 began and to a certain extent remains an independent station, competing against other independent stations in the Bay Area and local stations owned and controlled by the major television networks such as KPIX (CBS), KRON (NBC), and KGO (ABC). In recent years, many of the erstwhile independents have affiliated with new smaller networks, at least during the "prime time" evening viewing period (6–10 p.m.) when the TV stations are most profitable. Thus about 2 years ago, TV-20 affiliated with Warner Brothers; KTVU, Channel 2, TV-20's major competitor, has affiliated with the FOX net-

work; KBHK, Channel 44 is affiliated with United Paramount Network. KICU, Channel 36, remains a true independent. The competition is both for viewers and for advertisers. The more of the formers, particularly when measured during the twice per year so called "sweeps" period leads to more of the latter, and this in turn leads to greater profits since in general, advertisers will pay more to advertise their product or service during heavily watched programs.

I conclude this segment with a description of Respondent's corporate culture which is both interesting and relevant to the pending issues. It can be fairly characterized as California "laid back," casual and informal. The spirit is set by Gabbert himself who typically arrives at work around noon, usually accompanied by his dog. Most often dressed in a polo shirt and jeans, Gabbert saves business dress for special occasions when he interacts with the public or potential clients of the station. Many of the witnesses in the case who were current employees of Respondent affected nontraditional hairstyles, manner of dress and, if male, often unusual ear adornment.

The casual and somewhat unstructured atmosphere extended to employee discipline. Not only was there no progressive disciplinary policy, but such discipline for infractions which did exist was irregular and without apparent consequence. Witness this exchange in a telephone conversation with Gabbert which Pappas recorded after giving notice to Gabbert at the beginning.

> GABBERT: Do you know something Frank to get fired, I got, a television station. I think you have to kill someone.
> PAPPAS: Ha, ha, ha.
> GABBERT: You know I really do think about it. When was anybody last fired in the Production Engineering Department.
> PAPPAS: Hum.
> GABBERT: In over fifteen years, how many have been.
> PAPPAS: None come to the top of my head, that's for sure.

Gabbert went on to discuss a part-time employee who had made several mistakes during a recent weekend night of broadcasting TV-20's programs—just like the same employee had done the prior weekend (GC Exhs. 8(a), 7). The point was that the errant employee had not been fired, nor apparently otherwise disciplined. (The date of the Pappas/Gabbert phone conversation was January 21, a Sunday, approximately 3 months before Helen Perry was terminated.) Gabbert repeated this central point (i.e., to get fired at this television station, you essentially have to kill somebody) to a preelection gathering of unit employees. Gabbert testified that he made the statement to employees because it was true (Tr. 1177). I find that the primary reason Gabbert made the statement was to blunt the Union's organizing campaign by stressing that employee job security was not an issue in the campaign (Tr. 504, 721–722). Later in his testimony, Gabbert attempted to soften the effect of his testimony by claiming that he said, "You almost have to kill someone (Tr. 1226)." In any event, when challenged on direct examination to justify his termination of Helen Perry in light of his oft-repeated principle of casual discipline, Gabbert had this exchange with his attorney:

> Q. Did Ms. Perry kill someone?
> A. It was worse than killing someone.
> Q. Why is that?
> A. Going off the air. We have spent over a million dollars to keep this television station on the air 24 hours a day, seven days a week, all the time. It's so important.

There followed from Gabbert a 2-1/2 transcript page stream, of consciousness representing Gabbert's attempt to justify Helen Perry's termination (Tr. 1226–1228). Later on cross, the same subject came up again, and Gabbert continued in his talkative style (Tr. 1302–1303).

I reject all of Gabbert's testimony on this point, not only because it is preposterous and analytically suspect (thus in his zeal, Gabbert appeared to have confused Helen Perry's 7 minutes without audio with being off the air entirely). [2] but also because of other witnesses and evidence which rebut Gabbert's testimony. Thus the General Counsel presented a witness named Rowell (Ron) Santos, a former 6-year employee at Respondent who voluntarily resigned in May. It would unduly lengthen this decision to recite all of what this witness did wrong in performing the same duties as Helen Perry, but briefly, Santos aired the wrong program twice and several wrong commercials and due to his error, lost a picture for 1–2 minutes on more than one occasion. In addition, Santos was tardy, between 1–5 minutes about 90 percent of the time. For this parade of infractions, Santos was threatened with termination, but never terminated nor apparently otherwise disciplined. Instead he was told to try harder next time.

Perry herself lost a picture for almost 7 minutes in a 1994 incident which involved a second employee (R. Exhs. 18, 19). In a segment below, I will revisit this earlier incident and the April incident which lead to Helen Perry's termination. Another employee named O'Dell Williams negligently allowed about 2 minutes of dead air time and while he eventually was terminated for a different reason, he was not terminated for his dead air time. A former employee named Marks, who testified for the General Counsel, was repeatedly counseled for tardiness by his supervisor, Coulam. Marks resented this and did not improve his punctuality because, according to Marks, Coulam was himself tardy most of the time.

Respondent's informal atmosphere was also proven by the use and disuse of the timeclock system and the preelection system of taking breaks, on an ad hoc basis. Both of these subjects will be discussed below as they are part of the alleged unfair labor practices.

[2] Thus John Perry recited a tale of a former employee named Rob Barry who in 1986 or 1987 was responsible for 10 to 20 minutes of no picture and no programming. Without providing surrounding details, such as Barry's prior work history, or what time of the day or night the incident occurred, Perry testified that Barry was told he would be fired over the incident. Yet even for such a malefactor as this, Barry was allowed to resign in lieu of being fired.

3. Background on employees including alleged discriminatees

For purposes of this case, the engineering/production department unit of employees referred to above may be divided into two categories, master control operators (MCO) and production. MCOs essentially are responsible for monitoring the programs and commercials scheduled to run on their shift. Seated in a master control booth with a TV monitor and a vast array of technical equipment (R. Exh. 25), the MCO first has to program the various commercials scheduled for that shift. Prior to June 1994, that task required a large amount of effort as various commercials were contained in containers which needed to be retrieved and inserted into a play–back machine. In mid 1994, a library management system (LMS) replaced the old system. With the LMS, the MCO merely has to program commercials through use of a keyboard since the commercials are already in the system. A significant savings of time and energy resulted from installation of the LMS. The MCO also maintains certain daily logs, and takes periodic readings of power levels. Any discrepancy can be remedied by use of the remote controls to adjust the power for audio or video. The MCO is expected to be conversant with both the Moseley and TFT remote controls (R. Exhs. 27, 28) not just to perform routine operations, but in the event of a power failure affecting video or audio transmission.

Once the programming for a given shift was set, after the LMS was fully functioning, the MCO had relatively little to do and the work was thought by some MCOs to be boring. Accordingly, instead of watching 8 hours of television on TV-20, some MCOs during all or part of their shift, began to read magazines, newspapers, or even novels. Both John Perry and Gabbert were aware of this practice and tolerated it. Occasionally, MCOs were advised to read technical journals which were somewhat related to the job, but most who read during their job read nontechnical publications of general interest. In fact, a pile of recent magazines such as *People* was permitted in the master control booth. Part of this case deals with Respondent's postelection efforts to discourage this practice, by assigning additional work to the MCOs and the General Counsel's allegation that such effort constitutes unlawful retaliation.

Other unit employees work in production although most of this group is qualified to do MCO work and, in fact, there is some transfer back and forth both on a temporary basis, to relieve an MCO for a rest or lunchbreak, or to make a permanent change. In general, production work is thought to be more challenging and creative and therefore more desirable. It involves work on the only regularly scheduled live program called "Late Night With James Gabbert," usually taped on Tuesday evenings and broadcast on Sunday nights. The format of this show involves a movie shown in segments, and interspersed with a live band and guests in a bar set at the station. Production work here involves lighting, some editing, floor managing which involves interacting with guests, associate producing which involves recruiting guests and scheduling the band and performing related work. Other production jobs involve the making of promotion videos under Karen Provenza, who is alleged to be a statutory supervisor. She supervises two employees, who are long-term temporaries loaned to her from other departments. From time to time, Respondent will do live broadcasts away from the station, such as a parade, or a county fair and these efforts require production employees to meet special challenges.

a. Helen Perry

Helen Perry was hired by John Perry as an MCO in May 1992 and was terminated by Perry on or about April 29. Helen Perry's tenure with Respondent is checkered to say the least. Shortly after she was hired, Perry was tested as to her knowledge of the MCO duties and skills (R. Exh. 14). In a note to Helen Perry about the test results, John Perry wrote, "Helen, I think its GREAT you passed so well! But I need to know you do understand Questions 20 and 42 as they are important (R. Exh. 15). Perry had missed these two questions which relate to the "Hot Line" phone in the Master Control Booth and the meaning of "Multiplex" (i.e., to remedy the lack of audio during a broadcast, the MCO uses the remote control to apply the audio signal temporarily to one of the two visual tubes until a permanent solution is found). Because these two missed answers in 1993 would relate to Perry's performance in April 1996, they are deemed relevant to the case.

Helen Perry made other mistakes and committed other infractions while employed by Respondent. For example, in November 1992, Helen Perry was reprimanded in writing for, on two occasions before and after her shift, allowing a nonemployee into the building during nonbusiness hours in violation of Respondent's security policy. Perry's explanation that she allowed her fiancee in only to use the bathroom appears to be refuted by the length of the person's visit and by the fact that it happened twice on the same shift (R. Exh. 30). Then in February 1993 she ran an oral introduction on TV-20 for the program "Untouchables" when she should have run an introduction for the program "Perry Mason" (R. Exh. 17). For this mistake, she was reprimanded by John Perry (R. Exh. 31) and told that this and other errors could not continue. On May 26, 1994, Helen Perry expected to be relieved for a lunchbreak by another then employee named Robin Baskin. While the facts are not altogether clear, it appears that Helen Perry left the master control booth, but for some unknown reason, Baskin who had been standing nearby did not take over. Due to the lack of anyone performing MCO duties, a blank screen ran for 7 minutes (R. Exh. 18).[3] Helen Perry was found to be most responsible for the incident and given a stern written reprimand by John Perry whose apparent recommendation for dismissal was overruled by Gabbert and Lincoln (R. Exhs. 19, 32).[4]

[3] I credit Respondent's evidence that having a blank screen run and to a lesser extent no audio, is a major concern of Respondent's management and in the industry in general. When this happens, viewers will tend to go elsewhere and their departure will directly affect advertisers' willingness to spend their dollars with a given television station.

[4] Helen Perry credibly testified that she never saw R. Exh. 32 before she had been terminated. Instead, on April 30, when she came in to pick up her final check, she checked her personnel file and found it there. This is consistent with Respondent's disciplinary policy which is informal and irregular and not calculated to punish an errant employee, a concept seemingly foreign to Respondent. Moreover, John Perry conceded that with respect to a memo alerting employees to the "sweeps" month (R. Exh. 33), that he sometimes procrastinates. Accordingly, I can't be certain when John Perry wrote R. Exh. 32.

Finally, I note that while employed by Respondent, Helen Perry also worked parttime as an MCO for KRON–TV. While so employed for KRON, Helen Perry made some sort of an on–air mistake which John Perry became aware of and jokingly related to other employees at KOFY, Channel 20.

Notwithstanding all of this, Helen Perry was placed in the prime time MCO spot about 2–3 years before she was terminated and never moved from it. This shift, from 5 p.m. to 1 a.m. is critical to Respondent's profits. In fact, when Gabbert added additional duties to the MCOs after the election, he specifically exempted the prime-time MCO (R. Exh. 4) because he felt their attention should not be diverted from this daily important time period. In May 1994, Helen Perry received a scheduled merit pay raise. Then in November 1994, John Perry issued a memo to employees announcing that Dave Figura, who did not testify, was designated chief MCO and Helen Perry was designated alternate chief MCO (GC Exh. 29). Prior to this announcement, Figura had been the alternate MCO and he moved up when the incumbent left. The duties of the chief MCO include ensuring that various logs and records are kept up to date and meeting with FCC officials when they make either scheduled or unscheduled inspection visits. In Figura's absence, Helen Perry was expected to perform these duties.

All of this brings us to the events for which Helen Perry was fired. About 12:30 a.m. on April 26, for reasons that even Chief Engineer Coulam with the benefit of expertise, hindsight, and investigation did not know, the audio portion of the program in progress went off. In its place, a hissing sound emanated from the speaker in the master control booth and from however many television sets were turned to the program. The interrupted program happened to be a so-called "infomercial" for father's day tools and the absence of sound lasted about 7 minutes.

Respondent does not claim that Helen Perry was responsible for the initial failure, but it faults her for not effectively taking certain standard steps to remedy the problem immediately. In a letter to Helen Perry, dated April 29, John Perry succinctly states what is Respondent's basic position in the case:

> Ms. Helen Perry
> 1333 N. Camino Alto #248
> Vallejo, CA 94589
>
> Dear Helen:
>
> As you are aware, we apparently lost a temperature sensor in the Aural transmitter around 12:36 am last Friday morning, while you were the operator in charge. Although we have invested in all of the necessary transmitter equipment to provide a way to multiplex audio onto the video transmitter tubes, you apparently forgot or failed to use it. You know that the multiplex feature has been an option for the operator since the day the main transmitter was installed several years ago. Nonetheless, the owner of the station, Jim Gabbert, had to telephone you to advise you to use Multiplex to restore on-air audio.
>
> You not only forgot about multiplex, you failed to follow standard procedure by calling, then paging Steve Coulam to have him help you. When Mr. Gabbert called you, after seeing the lack of audio on the air, he had to guide you through the operation and audio was restored immediately. Had you followed the procedures that were in place in the event of the failure of the Aural tube, this seven-minute gap would not have happened. As it was, your failure to follow these procedures cost us viewers, and cost the station in lost paid-programming on the very first night of the ratings sweep. This follows an incident you were warned about nearly two years ago when you and another operator misunderstood which one of you was taking lunch—resulting in both of you leaving Master Control unattended, which again resulted in seven minutes of dead air.
>
> The situation that occurred last Friday morning was serious and, most importantly, was avoidable had you followed the appropriate procedures. Because you failed to do so, your employment is hereby terminated, effective immediately.
>
> Enclosed please find your final paycheck, which includes your unused vacation pay.
>
> Very truly yours,
>
> /s/ John Perry
>
> John Perry
> Technical Operations Manager
>
> [GC Exh. 26.]

In a second memo to all employees, also dated April 29, John Perry informs that Helen Perry is no longer with the company and should be treated like any other nonemployee (GC Exh. 12).

As a general guide to what Helen Perry should have done under the circumstances, I turn first to the KOFY master control operator's guide, sec. 4 (Perry Exh. 1). Some of the recommended steps have been superseded by the Moseley remote control which had only recently been installed before April 25. A chart on how to operate the Moseley was supposed to be in the Master Control booth (R. Exh. 10). A memo to all MCOs from Steve Coulam was also supposed to be posted in the same place and reads as follows:

> **DO *NOT* REMOVE THIS!**
>
> **READ**
>
> To: All Operators (cc: John Perry)
> From: Steve Coulam
> Subj: Transmitter Control
>
> April 10, 1996
>
> We are now using the new Moseley remote control for transmitter readings and control functions: The procedure is as follows:
>
> To read VISUAL power, push *1* then *CHAN*. The display will then indicate output power for Channel #1 in %.
>
> To read AURAL power, push *5* then *CHAN*. The display will then indicate output power for Channel #4 in %.
>
> Channel 1 is TOTAL VISUAL OUTPUT POWER; RAISE will turn the transmitter ON, and LOWER will turn the transmitter OFF.

Channel 2 is also TOTAL VISUAL OUTPUT POWER, but RAISE on channel #2 INCREASE visual power output, LOWER will lower it. You use this to adjust visual power up & down to keep it legal.

Channel 3 is VISUAL #1 POWER

Channel 4 is VISUAL #2 POWER

Channel 5 is AURAL OUTPUT POWER; RAISE will adjust AURAL power UP and LOWER will adjust it DOWNWARDS. This is used to keep aural power legal.

As you can see, if the reading on channel #1 drops to 25% or so, you can then look to actually see which visual is down by looking at channels #3 & 4.

When you use a RAISE or a LOWER function, you must FIRST press "TAKE CONTROL." Once you do this, you'll have 20 seconds to execute your command. If more than 20 seconds passes, you'll have to push "TAKE CONTROL" again. It is not necessary to push this simply to read the channels.

If you find yourself with NO readings per chance, try pressing 1 then SITE. This will ensure that the unit is "looking" at the Sutro system. The unit will always tell you what SITE is selected in the display.

[R. Exh. 28.]

In a discrepancy report (DR) filed immediately after the incident, Helen Perry wrote in part, [that the remotes weren't working] but "I didn't know that you had to push the 'take control' button." (R. Exh. 34.)

What Helen Perry did do was try to call Coulam without success, but she did not attempt to page him. Now in a panic, Helen Perry called for help from production people in the building, and Paul Pilette and Pat Huginin responded. The former testified as a Respondent witness. No longer employed by Respondent after 13 years ending in August, Pilette impressed me as a credible witness. Pilette credibly testified that neither he nor Huginin nor Perry could find Coulam's memo (R. Exh. 28) on the night in question, though he recalled seeing it before that night. Pilette further supported Perry's version that the Moseley Control didn't work at first, thus the strong incentive to find Coulam's memo. While searching for it, Helen Perry called John Perry waking him up. Before he could respond to the problem, Gabbert called in on another line as he had been watching his television at home at the time. He asked Helen Perry if she had "multiplexed" yet, but before she could respond to say that the Moseley was not working properly, Pilette said, press the "take control" button, which Perry did and the audio was then restored. Pilette further testified that he was in the booth for several minutes before multiplexing (Tr. 1425) "because the unit [Moseley] was new. And we weren't that familiar with it" (Tr. 1432).

John Perry who had been left hanging when Gabbert called, then hung up and called Coulam, waking him up and told him of the problem. Not knowing that by then, the problem had been resolved, Coulam got dressed and drove to the Mount Sutro transmitter where he undid the temporary multiplex solution and found the audio tubes working without a problem.

After the incident in question, Coulam wrote a memo to all MCOs which reads as follows:

To: All Operators, cc: John Perry
From: Steven Coulam
Subject: Multiplexing in the event of an Aural FAILURE

April 26, 1996

Dear Operators:

In the event of an aural transmitter failure, such as the one experienced last night, remember that you can always MULTIPLEX, that is, Channel 29 and LOWER.

However, due to technical circumstances, we are finding it necessary to dump the transmitter BEFORE you multiplex.

Therefore, the process to multiplex is as follows:

Select Channel #1, Take Control, and LOWER.
Select Channel #29, LOWER
Wait for exactly 15 seconds.
Select Channel #1, Take Control, and RAISE.

You are now multiplexed. Now, because the aureal has failed, it might be a good idea to get hold of me as soon as possible, as well as contacting John. If it is the middle of the night, and you cannot raise me by phone, be sure to page repeatedly as well as calling and leaving a message on my answering machine.

/s/ Steve Coulam

[GC Exh. 25.]

This after-the-fact memo is some evidence to support Perry's version of events.

After the incident, Helen Perry came to work the next day, a Friday, and spoke briefly about the incident to John Perry, admitting that she had forgotten to page Coulam and to multiplex. John Perry in turn also spoke to Pilette about the incident and discussed it with Gabbert recommending that Helen Perry be terminated. Gabbert concurred. On the following Monday, April 30, John Perry called Helen Perry at home to tell her not to come in that evening as she was being terminated for the events of April 26. Helen Perry came in anyway to pick up her final check from Michelle Mattea and acknowledged to Mattea that she had made a mistake. However, Helen Perry also adopted a philosophical attitude, telling Mattea that this bad experience might open new opportunities in another area of the country.

Respondent presented evidence to show that this incident was made more serious because the time in question was part of the "sweeps" period when audience viewing of television stations is measured, program by program. I accept this contention, but find it unlikely that a program like the Father's Day infomercial was measured for audience viewing.

Notwithstanding the relative new Moseley remote control, the lack of formal training on how to use the Moseley and other equipment, which was part of Respondent's informal culture, I find that Helen Perry did make a serious mistake as she herself acknowledged. Moreover, although there were certain mitigating circumstance, it was up to the MCO, assigned to the prime time shift to inform herself on how to operate the equipment in the event of an emergency loss of power. I further assume, without finding, that Respondent suffered certain financial consequence as a result of Helen Perry's mistake. Whether

Perry should have been terminated for her error is, as a general rule, a business judgment which only Respondent is capable and qualified to make. This finding does not end the inquiry on Helen Perry, but only begins it as I take up the parties' arguments in the analysis and conclusions section of this decision.

b. Brian Shimetz

This alleged discriminatee and the General Counsel witness began working for Respondent in June 1993 and resigned in June, after being told by John Perry that he had been selected to replace Helen Perry as the prime time MCO from Monday through Friday. During the time Shimetz had worked at Respondent, he had worked both as an MCO and in production and much preferred the latter, finding the former work extremely boring. Except for his final 2 weeks of work where he worked as Helen Perry's replacement after having given notice to John Perry, Shimetz had worked in the recent past splitting his workweek 2 days MCO and 3 days production.

Once Helen Perry was terminated, John Perry first assigned Pat Huginin to replace her for the next 2 weeks. As already noted, Huginin had been working the same time period under Provenza in Promotions, had MCO experience, and could make the temporary transfer without difficulty. Perry testified that he could not use Huginin permanently on the prime time shift, because "he's better suited to promo production" (Tr. 988–989). So John Perry also gave Shimetz 2 weeks' written notice that he was to be transferred into Helen Perry's timeslot:

> April 29, 1996
>
> Memo to: Brian Shimetz
>
> From: John Perry
>
> Subject: Shift change
>
> Brian, starting May 14th—you will be assigned the prime–time MCO shift, Monday thru Fridays, 5 pm to 1 am.
>
> This will finally give you the weekends off you have been asking for!
>
> I realize the 14th is a Tuesday—but you will be off on Sunday and Monday from the previous work week—that means your first week will be only Tuesday thru Friday.
>
> John Perry
> Technical Operations Manager
>
> [GC Exh. 28.]

Shimetz had two objections to his new assignment: First, he didn't wish to do MCO work exclusively since he found it boring; second, he didn't want to work on the prime-time shift as he would never have time to see his girlfriend during the week. Shimetz had lodged these same two objections in September 1994, when John Perry had offered Shimetz an opportunity to work the prime-time MCO shift. That time John Perry had accepted these reasons and assigned the shift to Helen Perry instead. Although Shimetz had been working on the split MCO/production shift during days, he was required to work on Sundays, which he didn't like either as he desired his entire weekend to be free. Shimetz was reluctant to perform any MCO work and asked John Perry in 1994 to assign him full-time production as soon as possible.

In May, Shimetz' pleas to remain where he was were not successful. As an alternative, he asked John Perry if he could return to a split shift performing 3 days of production and 2 days MCO. Perry was noncommittal but told Shimetz that he would look into the possibility. In fact, Perry did discuss the matter with Provenza, but by the time Shimetz resigned, no decision had been reached. In fact, Shimetz gave John Perry 2 weeks notice on May 14, that in light of Shimetz' inability to get answers to certain questions, he intended to resign. The pending questions: whether Shimetz could work a split shift; whether the assignment was to be permanent or temporary, and, to Gabbert, if Shimetz was the best man for the prime-time job, whether Shimetz could have a raise (no amount specified).

On May 20, John Perry wrote to Paul Pilette informing him that Shimetz was resigning effective May 31 and that Frank Pappas would be moving into the shift starting June 3. Perry also wrote, "in the event of ANY change with Frank (expected or unexpected), I may need to move you to the evening (5 p.m. to 1 a.m.) shift for a period of time. This would be while training and readying a replacement MCO for Helen Perry (GC Exh. 2).

On May 31, after Shimetz finished his shift, John Perry escorted him off the premises, but told him he would be willing to provide a reference to a future employer. Perry credibly testified that he liked Shimetz and was sorry to see him go as he did good work. In fact, Shimetz came back as a free-lance cameraman for a single day's work broadcasting a parade.

Before concluding this segment of the case, I note a few miscellaneous facts:

> (1) Prior to May 1, Shimetz's shift had changed numerous times and he occasionally was required to work shifts covering both Saturday and Sunday;
>
> (2) When Shimetz performed work as an MCO, work he hated, he was perhaps the most avid reader of novels and magazines, a practice, as I noted above, that was tolerated at least up to the election;
>
> (3) There is controversy as to whether John Perry assigned Shimetz to the prime-time shift on his own or whether Perry was merely doing what Gabbert had told him. Both Frank Pappas and Shimetz testified that in a conversation between Shimetz and Perry in Pappas' presence, wherein Shimetz protested the new assignment and asked whether it was temporary or permanent, Perry said, he didn't know as the decision to move Shimetz had been Jim's [Gabbert]. Perry then added that if Shimetz didn't like it, Jim would be happy to accept his resignation. This version of events is, in a sense, supported by Provenza who met with Shimetz in a bar after work, subsequent to notice of Shimetz's reassignment. Provenza asked, do you know why Jim put you in that shift. Shimetz answered, "Yes to get me to quit." And she said, "right" [Tr. 548].[5]

When Shimetz talked to Gabbert, Gabbert denied that he had made any such decision and said he told Perry only to get the

[5] In the analysis and conclusions segment of this decision, I will find Provenza to be a statutory supervisor, thereby weighing her statement against Respondent as an admission.

best person for the job. At this point, Shimetz asked for a raise, which Gabbert said he'd look into. According to Shimetz, he returned to Perry to tell him that Gabbert had said that Perry made the decision, to which Perry allegedly told Shimetz that Gabbert was lying. In their testimony at hearing, both Perry and Gabbert denied that Gabbert had made the decision to assign Shimetz to replace Helen Perry. In light of the evidence, I credit the General Counsel's witnesses to find that John Perry made the statement attributed to him. (However, I do not believe for a minute that Perry told Shimetz that Gabbert was lying.) While that does not necessarily make it so, the conflict between Respondent's managers as to how Shimetz came to be reassigned to Helen Perry's shift and Perry's testimony that it would be "very unusual . . . for him to receive instructions from Gabbert to assign a particular employee to a particular shift (Tr. 1010) raise inferences in the testimony that I will weigh against Respondent.

c. Frank Pappas

Pappas worked for Respondent between March 1992 and May 30 when he resigned. Primarily employed as an MCO, Pappas also performed some work in production such as floor managing, editing, associate producing, and audio and camera work. Like Helen Perry, Pappas' work history with Respondent reflects occasional work-related problems. For example, in July 1995, Pappas had been working on the weekly, "Late Night with James Gabbert" show, when he was advised that Gabbert was not happy with his work as floor manager and cameraman. Accordingly, Pappas was removed from these jobs, but was allowed to continue working on the show as associate producer with primary duties of scheduling and coordinating the guests. Sometime after the election, Pappas was also removed from his job as associate producer. Pappas' wages were not affected.

On December 18, 1995, Pappas met with John Perry and head of Production Jeff Giles for the purpose of generally discussing Pappas' job performance. At the conclusion of the meeting, Perry prepared a memo to the file which reads as follows:

> December 18, 1995
>
> Subject: Frank Pappas III
>
> On Friday, December 15, 1995—a meeting with Frank Pappas and Jeff Giles was held in my office to discuss Frank's job performance here at KOFY.
>
> The meeting was prompted by Frank Pappas' failure to broadcast an EBS emergency announcement as he had not checked to see if the EBS station (KCBS) was correctly feeding the Master Control switcher. (The AM radio tuner had been accidentally tuned to KGO radio instead of KCBS.)
>
> Frank had to go up to the KOFY-AM control room to obtain the correct information and then he initiated an EBS Activation—long after the announcement should have been put on air.
>
> This was the *second time* Frank Pappas has been involved in incorrect EBS procedures–and both instances were discussed fully with him. One of the PRIME duties of a Master Control Operator is to run EBS Activation's when they occur. FCC rules require the operator to follow a strict procedure in the event of EBS Tests and/or Activation.
>
> Frank Pappas had been removed from studio production earlier this year (at the end of July 1995) due to his not checking all of the required parameters needed to video-tape the All Nights' show. His usefulness to the production department was reduced greatly at that point since he cannot participate in studio/production work, especially where the station owner is directly involved. The owner of the station expressed his dissatisfaction with Frank's job performance at that time.
>
> I feel that Frank is also headed towards a similar situation as a Master Control Operator—especially when he didn't check all parameters required to air an EBS! My lack of confidence in his ability to pay attention to details consumed much of the discussion in the meeting held in my office.
>
> I further suggested that Frank's value and usefulness as an employee would be seriously undermined should I be required to remove him from any MCO position. I suggested that he might review his professional goals here at KOFY, because I believe he may well lack the interest/enthusiasm necessary to do the job required of him.
>
> Frank also was late to work Friday, and he was reminded that his work day is currently 8:45 am thru 5:15 pm . . . however a computer check (copy attached) of his attendance shows that his being late today is a rare occurrence.
>
> In summary, Frank was reminded that he has nearly exhausted his "usefulness" to the company with the problems he has caused these last few months. He agreed that his performance was not up to his best—and that he understands further instances may well be "the straw that breaks the camel's back."
>
> I feel both Jeff Giles and myself made our positions very clear to Frank Pappas about performance on-the-job, and that the time for allowing mistakes to continue are now at an end.
>
> /s/ John C. Perry /s/ Jeff Giles
>
> John Perry Jeff Giles
> Technical Operations Manager Production Manager
>
> [R. Exh. 6.]

This document was prepared and placed in Pappas' personnel file without notice to Pappas. He became aware of it several months later when he reviewed his personnel file.

On February 21, for unknown reasons, while working as an MCO, Pappas experienced a loss of audio for 20–30 seconds on a program in progress. Apparently, the problem corrected itself and Pappas merely prepared a routine discrepancy report (R. Exh. 11) which led to no further consequences.

On March 20, Giles placed a memo in Pappas' file to the effect that Pappas had been dilatory in performing a certain task assigned to him by Giles (R. Exh. 7). Once again, the memo was placed in Pappas' file by Giles without notice to Pappas.

This time Pappas became aware of the document in early May and he prepared a written rebuttal to Giles, listing certain alleged extenuating circumstances and accusing Giles of "grossly exagerating" Pappas' dereliction (R. Exh. 8).

Beginning in November 1995, Pappas had begun to work part time at KTVU, Channel 2, without notice to anyone in Respondent's management. Pappas earned $19 per hour there as compared to $12 per hour at Respondent. Working up to 20 hours per week at Channel 2, Pappas had been warned from the beginning by his superiors at Channel 2 not to quit his full-time job at TV-20, as there was no guarantee that Channel 2 had more hours available for Pappas. While at Channel 2, Pappas was trained in various technical equipment such as dubbing and microwave, and doing camera work, and Pappas candidly testified that his long-term goal was to leave TV-20 and be hired by Channel 2 on a full–time permanent basis.

On or about January 15, notice of the Union's petition was mailed to Respondent (GC Exh. 7). Then on Friday, January 19, after his day shift ended, Pappas was called into a meeting in John Perry's office with Giles also present. Perry testified at hearing that prior to this meeting, he had heard a rumor from a source he could not recall that Pappas had been working at Channel 2. Accordingly, he asked Pappas if Pappas was working at Channel 2. Pappas, the most prominent in-house union organizer, was guarded in his reply. Pappas stated that he wasn't sure if it made a difference and he wasn't sure if he was required to answer the question. At this point, John Perry left the office and returned minutes later with Gabbert. Perry then repeated his inquiry and Pappas repeated his prior answer. Gabbert then took over, saying that he could fire Pappas on the spot. Gabbert then launched into a discussion of alleged California law permitting employers to prohibit their employees from working part time at competitors. Pappas noted that he was uncertain what his rights were and Gabbert recommended that he seek legal advice over the weekend, say from NABET's counsel,[6] and return to work on Monday prepared to answer Perry's question.

As matters turned out, Pappas was unable to secure legal advice over the weekend, so on Sunday he called first John Perry and next Gabbert to request an extension of time. As already noted, Pappas told each that he was recording the conversation (GC Exh. 8). A transcript of the two conversations was prepared and entered into the record (GC Exh. 8(a)). In his recorded conversation, Gabbert launched a several minute soliloquy, finally agreeing to Pappas' request for a "comp" day off for Monday.

On Monday, Pappas called Channel 2 and asked for a week off, which request was granted. Then Pappas accompanied by another employee named Marty Marks, talked to Gabbert and told him either he was not then working at Channel 2, or was not working at Channel 2 "at this time," but asked permission to work there. As Pappas had not received an answer from Gabbert by Friday, he resumed working at Channel 2 as before, on evenings and weekends. Then at a mandatory preelection meeting on February 9, while Gabbert was talking about subjects relating to the election, Pappas interrupted him to say publicly that he was back working at Channel 2. Gabbert did not respond although he claimed to be stunned by the news. And Pappas heard no more about the subject of his second job until April 30.

On April 30, Gabbert issued a written policy on outside employment which according to Gabbert and Perry did no more than put into writing what had been the existing unwritten policy for several years. This new policy reads as follows:

MEMORANDUM

TO: All Employees
FROM: Jim Gabbert
DATE: April 30, 1996
RE: OUTSIDE EMPLOYMENT

While employed here, all employees are expected to devote their energies to their jobs with KOFY. For this reason, certain types of outside employment are strictly prohibited:

1. Employment that conflicts with an employee's work schedule, duties or responsibilities.
2. Employment that creates a conflict of interest or is incompatible with an employee's employment with KOFY.
3. Employment that impairs or has a detrimental effect on an employee's work performance.
4. Employment with a company that directly or indirectly competes with the business or the interests of KOFY.

Employees who wish to engage in outside employment that may create a real or apparent conflict of interest in any of the above categories must submit a *written* request to Jim Gabbert or Michael Lincoln explaining the details of the outside employment and requesting authorization for such employment. Employees who currently have outside jobs that may fall within any of the above categories *must* advise Messrs. Gabbert or Lincoln of such in writing by May 15, 1996, to obtain authorization to continue such outside employment. If authorization to work for another employer is denied, and the employee continues to work there, or if the employee having outside employment which may conflict with this policy does not seek written authorization from Messrs. Gabbert or Lincoln, he or she may be subject to immediate dismissal. Any questions concerning this policy should be directed to Messrs. Gabbert or Lincoln.

[GC Exh. 13.]

I do not credit the Respondent's evidence that prior to this written policy, there had been a consistently publicized and

[6] Gabbert denied in his testimony that his referral of Pappas to union counsel showed knowledge of Pappas' union activities. Instead, according to Gabbert, he merely assumed that all unit employees had signed union authorization cards. I reject this explanation. Respondent witnesses Michael Hollingshead and Robert Trigg took a public position against the Union and, in light of the election results, there may have been others. Accordingly, Gabbert must have known that not all unit employees signed cards.

applied unwritten policy regarding outside employment. For example, Pappas credibly testified that in mid-1992, John Perry told Pappas that the station doesn't care if employees work at other stations. Between September 1991 to September 1992, Helen Perry worked as an MCO for Station KRCB[7] with Perry's knowledge and without objection. Then between September and October 1993, Helen Perry was also permitted to work at KRON as an MCO with John Perry's knowledge and permission. Helen Perry voluntarily choose to end her job at KRON, because working two jobs was too arduous. The General Counsel witness Mark Metzler worked at KTVU, Channel 2, for about a month in August, before resigning from TV-20. Shimetz worked part time at KTSF, Channel 26, an Asian station, after being hired by TV-20 and again John Perry was aware, but did not object. Another General Counsel witness, Fred Beytin, a former Respondent employee, was hired by John Perry in August 1994, with the mutual understanding that Beytin would continue to work at KGO where Beytin had been working before Perry hired him. Beytin explained to Perry that he desired to be available when needed as a daily hire at KGO and Perry responded that there was no problem so long as there was no interference with work schedule or work itself. As matters turned out, Beytin worked very few days for KGO before resigning from TV-20 in June.

To be sure, a Respondent witness named Robert Trigg was aware of Respondent's unwritten policy on outside employment which required management permission. Trigg is a current Respondent employee, and has been so employed for 13 years and is an opponent of the Union. Similarly, Respondent witness Michael Hollingshead, also a current 15-year Respondent employee, was told by John Perry, shortly after his hire, of the unwritten policy and that requests for permission are handled on a case by case basis. In fact, Hollingshead who became the leader of the antiunion faction before the election, was permitted by Perry to work at KTSF, Channel 26 for a period of time.

I conclude that if Respondent had an unwritten policy regarding outside employment, it was disclosed to employees on an irregular basis and was rarely enforced, if at all, until the Union's petition was filed. This conclusion is based not only on the discussion above, but is also based on a conversation between Pappas and Provenza at work within a few days of General Councel Exhibet 13. Provenza commented to Pappas that Gabbert's memo of April 30 (GC Exh. 13) might just as well as have his name on it.

On May 15, Pappas sent a memo to Gabbert filing a claim for $618 in backpay based on breaks missed as a result of company policy and based on a compulsory meeting of December 15, 1995, which resulted in the written reprimand to Pappas published above (GC Exh. 15).[8] On the same date, Pappas sent a second memo to Gabbert which reads as follows:

15 May 1996

To: Jim Gabbert

Fr: Frank Pappas III

Re: Outside Employment

As you have known for several months, I am also in the employ of KTVU-TV Channel 2 in Oakland. My work there is strictly technical in nature. Since my current position here at KOFY is also strictly technical (I am no longer charged with any producer responsibilities) no genuine conflict of interest exists. Furthermore, based upon its superior size, revenues, and ratings, it would seem KTVU should be the one concerned about conflict of interest, not KOFY.

As per your memo dated 30 April 1996, I am hereby requesting authorization to continue my outside employment at KTVU. I am also requesting that your response be written and include the reasons for your decision, positive or negative.

Cordially,

/s/ Frank Pappas III

Frank Pappas III

[GC Exh. 16.]

The following day, Rachel Evangelista, Respondent's director of human resources, and Respondent's witness wrote back to Pappas, asking for details about Pappas' outside employment and also writing "Jim denies previously knowing that you are or have been working there [KTVU]" (GC Exh. 17). At hearing, Gabbert admitted that the quoted portion above was not true, but explained further that he had simply "forgotten" that 3 months before, at the February 9 preelection meeting, Pappas had informed him that he was working at Channel 2.

In any event, on May 16, Pappas wrote back to Evangelista as follows:

16 May 1996

To: Jim Gabbert c/o Rachel Evangelista

Fr: Frank Pappas

I feel obligated to begin by stating that your denial of current or previous knowledge regarding my employment at KTVU is problematic. Mr. Gabbert, you were well aware of my employment at KTVU as early as mid-January. I informed you again of my employment at KTVU during a mandatory meeting held on 9 February 1996. This meeting was called by you in response to the "union vote" scheduled for 13 February 1996 and was attended by the entire production staff. The main point here is that you have been aware of my employment at KTVU for several months; I have no difficulty substantiating my position.

In response to your request for more information regarding my duties at KTVU, they are as follows:

---

[7] This station was a public broadcast station which was not in direct competition with TV-20. However, no one ever told Helen Perry that was the basis for allowing her to work there.

[8] On May 22, Gabbert wrote back to Pappas enclosing a check for $16.48 and explaining the rationale for that amount. In part, the accompanying memo reads, "Prior to February 9, 1996, we simply allowed the employees to take their breaks when they desired. After February 9, 1996, we assigned employees specific times for them to take their breaks." (GC Exh. 19.) More about the issue of employee breaks will follow below.

Job Title: Studio Technician/Engineer
Department: Engineering
Supervisor: Ed Cosci
Phone: (510) 834–1212
Duties:
Setting-up & recording ENG—Truck feeds for news
Setting-up & recording SNG down-link feeds for news/programming
Setting–up satellite down-links for Giants baseball telecasts
Dubbing commercial/promo spots to beta for air in Betacart system
T/C (keeping Betacart loaded with correct commercial/ promo spots for air)
Studio Camera for News
Monitor Auto-Loggers and Transmitter readings
Quality checking & timing shows prior to air

I would appreciate your response (positive or negative) to be written and to include the reasons for your decision. Please note that my providing you with the information above DOES NOT constitute authorization for you to contact KTVU for the purposes of verification via phone, mail, or other means of communication. Should verification be an area of concern for you, I am quite confident a means to that end can be devised to the satisfaction of all parties concerned.

Thank you in advance for your prompt attention to this matter.

/s/ Frank Pappas III

[GC Exh. 18.]

On May 22, Gabbert wrote back to Pappas as follows:

May 22, 1996

To: Frank Pappas III

Fm: Jim Gabbert

re: Outside employment at KTVU

Thank you for providing your memos of May 15 and 16, 1996, in response to my request for information concerning your outside employment.

To be clear, although I have asked you in the past, you have never advised me what work you are doing at KTVU. Now that you have done so in your memo of May 16, 1996, I regret to inform you that it appears that that employment is not compatible with your employment here. The reasons for this decision are as follows:

First, as you know, aside from KBHK, KTVU is our largest competitor in the Bay Area. In your capacity as a master control operator at KOFY and generally, as an employee that works here, you have access to a wide variety of sensitive information that we want to keep form KTVU. For instance, at master control, you have access to our commercial logs and thus know what commercials we are running, how many, and when. Your memo indicates that you would have access to this similarly sensitive information at KTVU. At KOFY, you also have access to what commercials are being produced and for what sponsors. You would also have access generally, by being a KOFY employee who is allowed free access to our building, to know our sales promotions and sales planning, along with our billing information. All of this is proprietary information that we would not want to share with KTVU, even inadvertently. Your employment at KTVU, therefore, is incompatible with your employment with KOFY.

In these circumstances, I cannot allow you to continue your employment at KTVU while continuing to be employed here at KOFY. Hence, this is a request that you cease working at KTVU by the close of business on June 7, 1996. If you do not confirm with me in writing by that time that you have terminated your employment at KTVU. I will have no choice but to terminate your employment here with KOFY. I hope that will not be necessary. I would like to work this out with you if possible, but not in any way which would jeopardize KOFY's interest.

Please feel free to contact me if you wish to dispute anything said in this memo or should you wish to further discuss this matter.

[GC Exh. 20]

On May 23, Gabbert sent a memo to all employees which reads as follows:

TO: All KOFY–TV Employees

FROM: Jim Gabbert

DATE: May 23, 1996

RE: OUTSIDE EMPLOYMENT AT OTHER TELEVISION STATIONS

The purpose of this memo is to provide an example of the type of outside employment that I would consider to be incompatible with your employment here at KOFY. Due to the proprietary information that our employees have access to as a result of their employment at KOFY, you will not be allowed to work at any competing general market television station at any time in the future. If you are currently working at such a television station, and have not already informed me of such, please do so upon receipt of this memo. If I do not or have not heard from you in this regard, I will assume that you do not have such outside employment. Your failure to immediately inform me that you have such outside employment, and/or your refusal to cease such employment, will result in your employment at KOFY being immediately terminated.

Please feel free to contact me if you have any questions.

[GC Exh. 22.]

On May 24, Pappas wrote to Gabbert as follows:

24 May 1996

To: Mr. Jim Gabbert

Fr: Frank Pappas III

Re: Outside Employment

Dear Mr. Gabbert,

In response to your recent denial of my request to continue my outside employment at KTVU while in your employ; please be advised that I have absolutely no intention of terminating employment here at KOFY or at KTVU by 7 June 1996 or any other arbitrary date; thus I will be continuing my work at both stations for the foreseeable future. Thank you for your time.

Sincerely,

/s/ Frank Pappas III

Frank Pappas III

[GC Exh. 21.]

According to Pappas, the conflict with Gabbert represented by the series of memos placed a lot of stress on him and made him nervous about possibly losing his job. On May 28, Pappas met with Gabbert briefly to inquire about the May 24 memo and to ask where the controversy stood. To this, Gabbert answered that Respondent fully intended to fire Pappas, but only after a couple more memos to make matters look good. Gabbert added that he knew Pappas was trying to position himself so he could sue if he got fired. (Gabbert denied making these statements, but I credit Pappas because this seems in accord with Gabbert's general strategy in dealing with the union issue, both before the election and after. This strategy will be reflected in further discussions of the pre and postelection meetings and the various 8(a)(1) allegations, all in the analysis and conclusion sections of this decision.)

On May 29, Pappas called in sick to TV-20 and testified at the hearing that he had a fairly serious case of diarrhea. Pappas had been scheduled to work not only at TV-20, but beginning at 7:30 p.m., at KTVU, Channel 2. When Gabbert learned that Pappas had called in sick, he asked Evangelista to call Channel 2 and ask for Pappas. Someone said that he wasn't in, but was expected at 4:30 p.m.. When she called Channel 2 a second time, about 4:30 p.m., someone said Pappas was expected later. In fact, Pappas did work part of his shift at Channel 2 that day, testifying at hearing that he felt better later in the day.

The following day, Gabbert spoke briefly to Pappas around noon, saying in a "slightly sarcastic tone," "I hope you're feeling better." Then Gabbert stated that he was upset because Pappas had called in sick at TV-Channel 20 but had gone to work at Channel 2. Pappas angrily said that he had diarrhea, to which Gabbert responded, "Sure!" Pappas accused Gabbert of spying on him and of calling him a liar. Gabbert denied both charges, but said that he'd like to see Pappas [attendance] records at Channel 2 and that he'd subpoena them if necessary. Then Gabbert went back to his office on the second floor of the building.

A short time later, Pappas appeared at Gabbert's office in a rage, denying that Gabbert had any legal authority to subpoena his records from Channel 2. Gabbert blithely responded, that he might just call his friend at Channel 2, Kevin O'Brien, the station general manager, and get the records from him. This final remark pushed Pappas over the edge and he rushed into a nearby office to type out his resignation. The wording of this ill-advised document is helpful to gauge Pappas' state of mind. That is, the wording assists on the issue of whether Pappas made a voluntary, uncoerced, and unprovoked decision to leave Respondent's employment. Here is what Pappas typed:

30 May 1996

To: Jim Gabbert

Fr: Frank Pappas III

Mr. Gabbert, congratulations—you have finally succeeded in creating an environment so hostile to me that I can no longer tolerate being in your employ. I have been able to tolerate your past and present attempts to oust myself and the other vocal union supporters simply because my principles would not allow me to give up my rights without a fight. But even I have limits, I WILL NOT TOLERATE BEING CALLED A LIAR!

After I called in sick yesterday, you proceeded to call KTVU throughout the day in an attempt to establish that I was calling in sick at KOFY so that I could work at KTVU. To top it off—**you never even tried to contact me at my home!** Had you done so you would have discovered that I was in fact at home all day battling a case of diarrhea!!! Yes, I did end up going to work at KTVU that evening–but not until 7:30 p.m.—2-1/2 hours past my scheduled shift here at KOFY!

The final reprehensible acts was your behavior today. Your threat to "Subpoena KTVU's payroll records and check them against my Sick-days here" is laughable in terms of legal procedures—however it is quite serious in that it accuses me of lying. When I challenged your ability to subpoena records just because you feel like it–you stooped even lower and suggested that KTVU would just give them to you because you all "stick together." This statement is very interesting considering your contention that being employed at another station is a direct threat to KOFY and it certainly brings up numerous legal questions.

The bottom line is that you have accused my of lying. I think you know that whatever conflict or disagreement we have been involved with—from my union activity to my refusal to quit KTVU or KOFY—I have always been honest with you and very forthcoming—my positions have never been ambiguous. How dare you accuse me of lying.

Therefore, for the sake of my own personal well-being, I am forced to inform you of my resignation from KOFY-TV 20 effective immediately.

/s/ Frank Pappas III

[GC Exh. 23.]

Pappas then took the letter and personally handed it to Gabbert.

B. Analysis and Conclusions

1. Provenza's supervisory status

In Respondent's Exhibit 36, Karen Provenza is listed as "Promotions Director," with no staff indicated. This is somewhat misleading since she has two staff, Jeff Fisher and Pat Huginin, detailed to her by John Perry 4 and 2 years ago respectively. Before taking over her current job in January 1991, Provenza had been Respondent's news director, supervising 30 employees. When that department was abolished, Gabbert

offered her the current job with a slight reduction in pay and a corresponding reduction in workweek hours.

All agree that Provenza lacks authority to hire, fire, or discipline. However, she assigns work to Fisher and Huginin and directs them in their work. Provenza believes in the team approach in working with her subordinates, but if "push comes to shove," she has the final say. The idea for an approach to a given promotion usually originates with Provenza.

As the party seeking to prove that Provenza is a supervisor, the General Counsel has the burden of proof. *Northwest Florida Legal Services*, 320 NLRB 92 fn. 1 (1995). Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The first portion of Section 2(11) is read in the disjunctive. The possession of any of the powers enumerated there, however, confers supervisory status only if its exercise "involves[s] the use of true independent judgment in the employer's interest" *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1098 (6th Cir. 1981).

I find that for all times material to this case, Provenza was a statutory supervisor because she responsibly directs the work of her subordinates; Fisher and Huginin. To be responsible is to be answerable for the discharge of a duty or obligation. The focus of inquiry is whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employee he or she directs. *NLRB v. KDFW, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986). In *KDFW, Inc.*, the court affirmed the finding of the Board's Regional Director that directors, producers, associate producers, and assignment editors at a television station were not proven to be statutory supervisors. The facts of the instant case, however, are more like those found in *WTAR Radio TV Corp.*, 168 NLRB 976, 978 (1967), where the television directors excluded from the unit as supervisors were in charge of video taping sessions for commercials, promotion spots, and public service announcements. The director is responsible for the program content, including air quality. Like Provenza, the director also assigns work to members of his crew based on his evaluation of the capabilities of individuals. See also *KDTN-TV*, 267 NLRB 326 (1983).

In the instant case, Provenza testified that about half of the work of her unit is routine where her two subordinates need little or no direction, but the ratio changes throughout the year (Tr. 1454). Whether the work is routine or not—and Provenza is the one to decide what is routine—Provenza remains responsible for the end product, the promotions and other material. Thus she remains constantly responsible for the work of the two persons assigned to her as the quality of their performance would clearly affect Provenza's tenure. Accordingly, I find that Provenza had the authority by using independent judgment to responsibly direct the work of Fisher and Huginin in the interest of the Employer. She is therefore a statutory supervisor.[9] See *NLRB v. Health Care & Retirement Corp.*, 511 NLRB 571, 573–574 (1994).

Because Provenza is a supervisor, I will impute to Respondent the remarks she made to Shimetz and to Pappas. Further, in agreement with the General Counsel (Br. 22), I find that it is undisputed that prior to her termination, Helen Perry told Provenza, Program Director Michelle Mattea, and Public Service Announcement Director Carol Fertick of her support for the Union. As to Provenza, Helen Perry told her that her support for the Union wasn't a money issue but rather a matter of getting equal treatment (Tr. 341). Provenza's knowledge of Helen Perry's union activities will also be imputed to Respondent.[10]

2. Alleged 8(a)(1) violations

a. Overview

As the reader may have gathered by now, Gabbert while an engaging and affable person as one might expect for an on-air television personality, is also loquacious. This trait is most apparent in this segment of the case. In conducting his campaign against the Union, Gabbert conduct both a preelection (February 9) and postelection (on or about February 20) meeting with unit employees. In addition, he conducted several individual meetings with employees, again before and after the election, sometimes "one on one" in his office or in and around employee work areas, and sometimes with one or more other representatives of management present. As I will find below, in his zeal to defeat the Union and to erect a barrier against the Union or any Union returning, Gabbert crossed over the line repeatedly and violated the Act.

In reviewing the 8(a)(1) allegations of the complaint involving supervisor's statements, I will, where applicable, use the Board test to determine whether, under all the circumstances, the supervisor's remarks reasonably tend to restrain, coerce, or interfere with the employee's rights guaranteed under the Act. This test does not depend on motive or whether the coercion is successful. *GM Electrics*, 323 NLRB 125 (1997). Moreover, in determining whether statements are coercive threats, the Board considers the effect of the remarks from the point of view of those whose livelihood may depend upon them in order to pick up implications intended by employers that might be more easily dismissed by a more disinterested ear. *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1299 (6th Cir. 1988).

Not all the allegations involve threats; some involve the offer of benefits and solicitations of benefits. These too will be appropriately reviewed.

[9] There is also evidence that Provenza had the authority to agree to or deny Shimetz's proposal for a split workweek involving 2–3 days of production. This authority over employee work schedules and job assignments is further evidence of her supervisory status. That Provenza did not exercise her authority before Shimetz resigned is of little import, since it is the existence of authority, not the exercise of that authority, which determines whether an individual is a supervisor. *Famous Amos Chocolate Chip Cookie Corp.*, 236 NLRB 1093 (1978); *Babcock & Wilcox Construction Co.,* 288 NLRB 620, 621 fn. 3 (1988).

[10] Activities, statements, and knowledge of a supervisor are properly attributable to the employer. *Pinkerton's, Inc.*, 295 NLRB 538 (1989).

b. Alleged unlawful solicitation of employee complaints and grievances

As already noted, Respondent held a mandatory meeting of unit employees on February 9. Some the General Counsel witnesses recalled that John Perry was there, either continuously or in and out, and that Giles and other supervisors were also there. I am satisfied that Respondent witnesses are correct—that only Gabbert and Lincoln were present and that Gabbert did almost all of the talking.

Gabbert told the employees that Respondent had been in financial straits in recent years and that he was embarrassed that the wage freeze which he had ordered in 1993 had never been lifted, although he thought it had been. Gabbert also referred to a 401(k) plan then being formulated. Unfortunately he added, due to the approaching election only nonunion employees could take immediate advantage of these benefits. Unit employees would have to wait. Gabbert also referred to the current fiscal condition of TV-20 as compared to other stations, using a dry-erase board to make his points. Gabbert included some personal history including how he happened to get started in the business, a letter he wrote to his parents in the 1950s asking for a loan to buy his first radio station and even a current pay stub to show he wasn't making much money either.

Then Gabbert discussed the approaching election, noting that the employees were all family and that he knew job tenure was not an issue since no one had been fired for years. If the Union won, Gabbert said, he would only be required to negotiate in good faith (using his fingers to indicate quotation marks over good faith). Gabbert also recited that he was under no obligation to sign a contract and only had to negotiate for a year. Gabbert conceded that Shimetz and perhaps others challenged his use of quotation marks as raising a question about his intended good faith.

At the conclusion of Gabbert's remarks, there is some controversy about what happened next. Gabbert testified he never solicited grievance and never asked if there were any questions; he merely stopped talking (Tr. 1175). This account is contradicted by Respondent's witness Hollingshead, who testified that Gabbert asked for comments, before various employees either asked questions or aired grievance (Tr. 1374). Pappas and Helen Perry testified that Gabbert did more than stop talking, he asked if there were any questions. Shimetz testified that Gabbert specifically asked to hear employees' problems. Fred Beytin testified that Gabbert opened the meeting for any questions.

I find that Gabbert asked employees for comments or questions. In response, many employees did raise grievances. Helen Perry, for example, complained that she was working too many holidays and was entitled to greater pay for this effort. She also was unhappy that John Perry had not permitted her time off to deal with flood damage at her home and that he had publicized to other employees a medical problem which Helen Perry's son experienced. Gabbert responded to Helen Perry by noting that she could have been fired for letting her fiance into the station to use the bathroom several years before. Pappas raised an issue regarding breaks which he said were being required at the beginning and end of the MCO shift rather than in the middle of the a.m. and p.m. shifts. Even for proemployer employees, it didn't take a weather vane to tell what direction the wind was blowing. Hollingshead asked if the lunchroom could be improved and if lockers could be installed.

To all of these grievances, Gabbert either said he'd look into it or take care of it, or as to Helen Perry's hurt feelings, he apologized for John Perry's mistakes. I find that in the context of Gabbert's reference to the employee "family," his reference to COLA and 401(k) benefits to come after the election and his statement that he knew tenure was not an issue, the violation has been established.[11]

When an employer institutes a new practice[12] of soliciting employee grievances during a union organizational campaign, there is a compelling inference that he is implicitly promising to correct the inequities, and likewise promising that the combined program of inquiry and correction will make union representation unnecessary. *Noah's New York Bagels,* 324 NLRB 266 (1997). See also *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 905 (6th Cir. 1997). I find that Respondent's entire course of conduct indicates that it has violated Section 8(a)(1) of the Act as alleged. *Mast Advertising*, 286 NLRB 955 fn. 2 (1987).

c. Cancellation of "Late Night with James Gabbert" show as alleged retaliation for union campaign

A day before the Tuesday taping of the "Late Night with James Gabbert" show, Gabbert posted a cancellation notice. That Tuesday was February 13, the day of the election. Before agreeing to use the studio for the election, the parties considered other places in and around Respondent's premises but eventually rejected them for one reason or another. The studio was where the "Late Night with James Gabbert" show was to be taped. In addition, the p.m. vote was to occur between 4:30 and 5:15 p.m., the time when the show was normally taped.

I have considered the General Counsel's argument regarding this allegation (Br. 5–9), particularly in light of other evidence in this case, and find the General Counsel has failed to establish a prima facie case. I assume without finding that the show was a benefit for employees, the loss of which for union-related reasons would violate Section 8(a)(1). In this regard, it is uncertain whether any employee suffered a financial loss, although they did lose a single week's opportunity to perform additional work, additional work which some or most employees generally enjoyed. However, since this show was canceled immediately before employees voted, the effect could have been felt either way so far as Respondent's fortunes are concerned. The General Counsel argues that the decision to cancel was made the night before Gabbert knew exactly where the election was to be held. However, Gabbert knew that the election might be held in the studio and with employees assigned to the show having to vote, the conflict is more real than imagined. Moreover, Gabbert knew that scheduled guests including a band had to be notified as soon as possible, and even with a

[11] I also note the many preelection one-on-one meetings between Gabbert and various employees in which the same grievances were solicited with an implied promise to remedy.

[12] I find that Respondent did not have any preexisting policy on practice of soliciting grievances from its employees.

day's notice, some guests didn't get the word and showed up anyway.

The only colorable claim possible in this segment is to fault Respondent for failing to reschedule the show as had been done in the past. In this regard, I credit Respondent's evidence showing that it would have been too difficult to reschedule the same or a different (desirable) band and guests in time to fully prepare the tape for a Sunday showing. The rescheduling had been possible in the past because there had been more notice than was available here and there is a further question in the present case regarding Gabbert's availability. In conclusion, I note that the show's cancellation was never mentioned in the pre or postelection meetings, and there was never any question about future cancellations after that on election day. Because the inferences the General Counsel asks me to draw are too remote and tenuous, I will recommend that this allegation be dismissed.

d. Alleged blame for delayed pay raises on union organizing drive

As found above, Gabbert's discussion of the tardy COLA raises accomplished two goals. First, it attributed to the Union blame for even longer deferral sometime after the election. Then Gabbert promised that after the election, even unit employees would be made whole. What need for the Union under these circumstances. Respondent contends that Gabbert was doing only what the law allows. In its brief at pages 75–76, Respondent notes certain conflicts between the General Counsel's witnesses on the subject of Gabbert's statements. However, Gabbert's statement that he had been unaware for about 3 years that employees had not been receiving COLAs is suspect in light of his "hands on" management style. In any event, even if true, he would not have learned of the allegedly inadvertent continued pay freeze, but for the union campaign and Gabbert's impression that low pay was a major issue (witness the difference in pay between TV-20 and KTVU, Channel 2 employees). The general rule is that in organizing situations, an employer must grant benefits "as it would if a union were not in the picture." *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997). An exception to the rule allows an employer to postpone a wage or benefit adjustment so long as it makes clear to employees that the adjustment would occur whether or not they select a union, and that the sole purpose of the adjustment's postponement is to avoid the appearance of influencing the election's outcome. However, an employer must avoid attributing to the union the "onus for the postponement of adjustment in wages and benefits." *Atlantic Forest Products,* 282 NLRB 855, 858 (1987), citing *Varco, Inc.*, 169 NLRB 1153 (1968).

In the instant case, if the continuation of the wage freeze was truly inadvertent, then Respondent should have made the employees whole as soon as the inadvertence was discovered. Instead, Respondent delayed the already long overdue COLA's and attributed the delay to the Union's organizing campaign and the pending election. This violates Section 8(a)(1) of the Act and I so find. *Seda Speciality Packaging Corp.*, 324 NLRB 350 (1997); *Baker Brush Co.*, 233 NLRB 561, 562 (1997). *Atlantic Forest Products,* supra, 282 NLRB at 858.

e. Alleged unlawful employee interrogations

The General Counsel challenges two one-on-one meetings: first in late January, Gabbert asked Helen Perry to come to his office early in the morning. Among the subjects Gabbert raised were the by now familiar themes, KOFY lacks financial reserves, a 401(k) plan is in process, but it can't be offered to Perry as she signed a union card, and he can't give her a pay raise for the same reason. Then Gabbert asked if Perry had any problems and she related some of the same problems mentioned in the February 9 meeting. The meeting ended by Gabbert asking her if he could count on her vote.

Marks also described a meeting with Gabbert at the latter's request about 2 weeks before the election. In addition to the same subjects discussed with Helen Perry, Gabbert also talked about an alleged open door policy whereby employees could come to him about any problems they had. Gabbert also referred to a prior organizing campaign with newscasters, where he had refused to bargain in good faith. Gabbert also asked Marks how he felt regarding the Union.

In his testimony, Gabbert admitted meeting with Helen Perry to talk about the poor financial condition of the company and to show her his current pay stub. He denied asking for her vote. Gabbert could not recall any private conversation with Marks. I credit Helen Perry and Marks to the extent their testimony regarding conversations with Gabbert track each other. More specifically, I credit both and find Gabbert asked Perry, if he could count on her vote and he asked Marks how he felt regarding the Union.

Although Helen Perry tended to be an open union supporter, Marks was not. The fact that a high official like Gabbert in his office, or even in an employer's hallway attempted to probe employees' union sentiment and even asked for a commitment from Perry is coercive and violates Section 8(a)(1) of the Act. *Pleasant Manor Living Center*, 324 NLRB 368 (1997); *Reno Hilton*, 319 NLRB 1154, 1179, 1184 (1995); *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

f. Alleged disclosure to employees of plan to implement 401(k) plan in order to influence election

To put this issue in perspective, I begin with the testimony of Respondent's witness, Evangelista. She credibly testified that on orders from her supervisors, she began to work on a 401(k) plan in July 1995, long before the union organizing drive began. Among other tasks performed by Evangelista, she solicited proposals from various providers who wished to obtain Respondent's 401(k) business (R. Exhs. 37, 38). She also held meetings with various provider representatives to obtain more information. On February 9, Gabbert told gathered employees at the mandatory meeting that the company had been working on a 401(k) plan for some time (Tr. 1143). Respondent witness Hollingshead testified that Gabbert clearly stated on February 9, that employees outside the unit would not receive 401(k) benefits before the election (Tr. 1387). However, Gabbert also assured unit employees that sometime after the election, they would be receiving a 401(k) benefit.

In *Weather Shield of Connecticut*, 300 NLRB 93, 96 (1990), the Board reversed the judge's finding that a violation of the Act had occurred in the election eve announcement of pension

benefits for its employees. Relying on *Scotts IGA Foodliner*, 223 NLRB 394 fn. 1 (1976), enfd. mem. 549 F.2d 850 (7th Cir. 1977), the Board explained that the announcement during a union campaign of the availability of certain existing insurance benefits did not violate Section 8(a)(1). By contrast, the 401(k) plan at issue here was not an existing benefit as of February 9 because Evangelista was still negotiating with various providers. In fact, Evangelista did not finally select the provider used and conclude negotiations until April. Accordingly, I find that *Weather Shield of Connecticut,* supra, may be distinguished from the present case.

I find that Respondent's timing in announcing the 401(k) plan prior to the election was calculated to influence employees in choosing a bargaining representative. *Predicasts, Inc.*, 270 NLRB 1117, 1120 (1984). See also *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 850 (D.C. Cir. 1984). At the same time, Gabbert placed the onus for the delay in coverage for unit employees on the Union. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act for both reasons.

g. Gabbert's alleged misstatement of labor law

I find that on February 9, Gabbert told the assembled employees that if the Union won, he would be required to negotiate with the Union, absent an agreement, for a year at the end of which the parties would start all over again with another election (Tr. 1172–1173). I agree with the General Counsel that Gabbert misstated applicable law as there is no automatic requirement that bargaining cease after 1 year's time. Gabbert's use of his hands to gesture quotation marks before and after, "good faith," lends further credence to the implied message, that "good faith" may have an opposite meaning in this context. Accordingly, the totality of the message conveyed was that it would be futile for employees to select a union. See *Orbit Lightspeed Courier Systems,* 323 NLRB 380 (1997); *Wall Calmony Corp.*, 173 NLRB 40 (1968). Cf. *Great Dane Trailers*, 293 NLRB 384 (1989).

Based on the above, I find that Respondent violated Section 8(a)(1) of the Act.

h. Gabbert's alleged threat to discontinue providing employees with beer in connection with the taping of the "Late Night with James Gabbert" show if the Union won the election

According to Pappas, sometime before the election, he was working in production of the "Late Night with James Gabbert" show. Prior to the taping, he was drinking a beer, when Gabbert allegedly came up to him and said if the Union wins, you won't be able to do that anymore. Gabbert denied the remark in question and explained that for sometime prior to the election, it had been his custom to provide employees working on the "Late Night with Jim Gabbert" show with beer after the taping was complete, but never before.

I don't believe Pappas on this point and credit Gabbert. At the time of the alleged threat, Pappas had already been removed from more responsible duties in connection with the "Late Night with James Gabbert" show for poor work. He had, however, been permitted to continue working in a lesser job. The show featured Gabbert himself in a prominent role and if Pappas had been drinking a beer before taping, he might have had had one or more before the one seen by Gabbert. The drinking could have impaired his performance already clouded by perceptions of poor work and directly impacted Gabbert. Under these circumstances, I don't believe that Gabbert would have uttered the threat in issue, and then allowed Pappas to continue drinking the beer, perhaps to be seen by other employees who may have been thirsty too and desired the same privilege.

For the reasons stated above, I will recommend that this allegation be dismissed on credibility grounds.

i. Alleged announcement of a new break policy for MCOs

I have found above that Respondent unlawfully solicited grievances at the February 9 meeting. I also found above that one of the grievances solicited was from Pappas and concerned the unusual break policy then in effect for MCOs. On February 13, election day, Respondent responded to Pappas' concerns with a memo which reads as follows:

> February 13, 1996
>
> Memo to: Production/MCO staff
>
> Subject: A new MCO schedule
>
> This new schedule also includes rest-periods (breaks) shown, approximately halfway through each 4-hour work period. A 15-minute break is scheduled twice on each shift with the name of the person who will relieve the MCO for that 15-minute break. The break need not be exactly halfway through each 4-hour work period, but should be as close as practicable. I suggest the break be given after the start of the new show. As you already know—when circumstances prevail where there is no break or lunch given, the MCO is paid OT for the time. Therefore taking a break is not an "option" for the active MCO, and I wish to conform with the law. (As it is, 10 minutes is required; KOFY provides 15 minutes.) Please, only under special circumstances should any Op forgo taking a break. This keeps the OT to a minimum.
>
> As always—please let me know if you have a problem with this or want to discuss it.
>
> John Perry
> Technical Operations Manager
>
> [R. Exh. 3.]

On May 22, Gabbert send another memo to Pappas—one in a torrent of back and forth memos referred to above—in which Gabbert wrote in part,

> Prior to February 9, we simply allowed the employees to take their breaks when they desired. After February 9, we assigned employees specific times for them to take their break. In these circumstances, we do not believe you are owed any monies based on your claim that you were denied or prevented time to take your breaks. [GC Exh. 19.]

Sandwiched between these two documents was a meeting in the lunchroom between Pappas and Gabbert and John Perry. While there was disagreement on whether Pappas' grievance regarding breaks was factually correct, Gabbert did tell John Perry prior to the election, "If there's something wrong, fix it" (Tr. 1192).

In reviewing this allegation, I need not decide whether Pappas' grievance was valid, though I do find it was honestly and sincerely tendered in response to Respondent's unlawful solicitation of grievances. See *New Life Bakery*, 301 NLRB 421, 427 (1991). In this case, there was not only an implied promise that the grievance would be remedied, but it was in fact remedied, in time for employees to take note before they voted. I find that Respondent violated Section 8(a)(1) of the Act as alleged.

j. Alleged unlawful threats to move production to Marin County, to subcontract work performed by production employees, and to lay off 12 employees, if the employees had selected the Union

In reviewing this allegation, I find no credible evidence that any of the threats were made prior to the election. On the other hand, I do find credible evidence, from Pappas and form Gabbert's own testimony, that he did make the statements at the postelection meeting on or about February 20 and at other times. More specifically, Gabbert told the assembled employees on February 20, that he had looked at contingencies if the Union had won "that we had looked at moving the production offsite, that he had considered shutting down the Production Department and laying off 5–6 employees." (Tr. 1197.) Gabbert was somewhat more direct in talking to Beytin, shortly after the election, referring to a list of 12 employees to be laid off if the Union had won. In fact, I find that Gabbert did refer to the list of 12 employees to be laid off, at the February 20 meeting. I also find that John Perry used the exact same language in talking to Shimetz in the former's office, about a week after the election. I must conclude that the plan to move the production department and layoff 12 employees were not idle threats.

In a familiar carrot and stick strategy, Gabbert coupled the above remarks made at the February 20 meeting with assurances of no retaliation and a desire to move forward. However, Gabbert's implied message to the employees with the challenged statements was that if the employees should ever try to organize another union or if the Union might file objections which could lead to a second election, employees should consider themselves forewarned with contingent threats.

I find that Respondent violated the Act by making the threats at issue. *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1318 (7th Cir. 1989). While perhaps not retaliation, the statements in question are motivated by an intent to deter any further employee activity aimed at changing working conditions. See *Dayton Hudson Department Store Co.*, 324 NLRB 33 (1987) (concern with renewal of a union's campaign).

Respondent's argument as to this segment is puzzling indeed. First contending that the threats were made after the election, an argument I agree with, it then asserts as a defense a standard for truthful preelection predictions (Br. 88–89). In any event, Respondent's argument is as meritless as it is contradictory. The fact is, under the facts and circumstances found herein, the threats made by Gabbert after the election violate Section 8(a)(1) of the Act and I so find.

k. Gabbert's alleged statement that he would never sign a union contract

One final challenge is brought to a statement of Gabbert's made at the February 20 meeting. Both Pappas and Beytin testified that in the course of his remarks, Gabbert stated that he wanted to correct something that he had said on February 9: Gabbert wouldn't sign a contract with the Union even with a gun pointed at his head. Hollingshead had been the source of the rumor regarding what it would take to get Gabbert to sign a contract (Gabbert would sign only with gun to head). Although, Gabbert did admit someone had asked him if it was true that he wouldn't sign a contract even if a gun was held to his head, he allegedly just laughed off the question and never answered it. I credit the General Counsel's witnesses on this point and find Respondent violated Section 8(a)(1) of the Act by implying to employees, it would have been futile to vote the Union in since a contract would never have resulted. *Tube-Lok Products*, 209 NLRB 666, 669 (1974); *Hedaya Bros., Inc.*, 277 NLRB 942, 957 (1985). Again, I find no defense that the statement was made after the election was over.

3. Alleged unlawful termination and unlawful constructive discharges

a. Applicable law

The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities." *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Fluor Daniels, Inc.*, 304 NLRB 970 (1991), and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false

reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991).

In this case, I find that the General Counsel has established a strong prima facie case of discrimination against Helen Perry, Shimetz, and Pappas because of their union or other protected activities.

b. Factual basis for prima facie case

The evidence does not show that the three alleged discriminatees participated in union or other protected concerted activities to the same degree. However, the evidence shows that all did so participate. Perhaps Pappas was the most active union supporter. For example, he polled other employees to gauge their support for the Union and distributed union brochures to employees, he acted as a conduit between the Union and employees with respect to union meetings and other union-related information, and he wore a union pin on his jacket back and forth to work. In addition, Pappas signed a union authorization card and circulated cards to others to sign. Finally, he acted as the Union election observer on February 13.

By comparison to Pappas, the protected activities of Helen Perry were of a lower profile and less extensive. Essentially her union activities consisted of telling other employees sometimes in a loud and public fashion, that she supported the Union. Helen Perry also conveyed these same prounion views to a number of Respondent's supervisors like Provenza, like Michelle Ball, program manager/director, like Carol Fertick, public service announcement director and like Michelle Mattea, business manager (only Mattea denied having had such a conversation).

Shimetz fell somewhere between Pappas and Helen Perry. Thus, Shimetz was part of the original group that initially met with NABET representatives. He placed union stickers in and around Respondent's premises and circulated union authorization cards to about four employees.

Respondent's officials, Gabbert and John Perry, denied they were aware of the union activities of the three alleged discriminatee (other than Pappas' public role as an election observer) and further denied that any adverse personnel decisions affecting the three were motivated by their union activities.

Contrary to Respondent's contentions, I find that Respondent was aware that the three alleged discriminatees were strong union supporters. Helen Perry told supervisors what her views were and their knowledge is imputed to Respondent. Gabbert told Pappas before the election to seek advice from union counsel as to whether he could work part-time at KTVU, Channel 2. Gabbert's explanation that he merely assumed all unit employees had signed union cards is not credited. His statement to Pappas subtlety conveyed to Pappas and to me that Gabbert was aware of Pappas' union activities. Moreover, in the recorded telephone calls made 2 days later, Perry is quoted as saying that "I think its terrible we're on opposite sides of a line (GC Exh. 8, 1), a reference to Pappas' support for the Union.

Furthermore, I note that at the February 9 meeting and at the various one-on-one meetings held between Gabbert and the three alleged discriminatees, grievances were solicited and promises were made either explicitly or impliedly to correct the problems. Thus, Pappas was concerned about break policy, Helen Perry with holiday pay and Shimetz with work schedules.[13] The solicitation of grievances while illegal for the reasons already stated, also served the purpose of identifying those dissatisfied with the status quo. This process seemed to further identify union supporters and confirm the identities of those suspected of sympathy for the Union, because rarely do those who are satisfied with the terms and conditions of employment support the changes which a union would bring.

Based on the entire record, I find that Respondent was aware of the union activities or other protected concerted activities of the three alleged discriminatees. See *Matthews Industries*, 312 NLRB 75, 76 (1993). As to animus of Respondent toward the Union and its supporters, I find overwhelming evidence to support animus. In part, this evidence consists of statements from Gabbert himself, from Respondent's own witness (consider, Hollingshead circulated the rumor about Gabbert's unwillingness to sign a union contract "Because [he] knew of Jim's extreme anti–union attitude" (Tr. 1388) and from my findings of numerous 8(a)(1) violations. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 692 (7th Cir. 1982). These violations remain, and lend their aroma to the context in which the contested issues of discharge and constructive discharge are to be considered. *Rock-Tenn Co. v. NLRB*, 69 F.3d 803, 808 (7th Cir. 1995).

c. Helen Perry discharge

I have recited in detail above the loss of 7 minutes of audio time. I have also found that Helen Perry was at fault for not restoring audio sooner than was done. If an employee provides an employer with sufficient cause for [discipline] by engaging in conduct for which he or she would have been disciplined in any event, and the employer disciplines him for that reason, the circumstance that the employer welcomed the opportunity to discipline does not make it discriminatory and therefore unlawful. *Klate Holt Co*., 161 NLRB 1606, 1612 (1966).

However, "the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination." *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981). For, "the pivotal factor is motive" (citation omitted), *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15, 20 (1st Cir. 1966), and the ultimate "determination which the Board must make is one of fact—what was the *actual motive* of the discharge?" *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). In conducting analysis to reach that determination, I recognize that "The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co.*, 257 NLRB 65, 65 (1981).

[13] I find that at least as to Pappas and Helen Perry, the complaints brought to the attention of management, were not personal gripes. Instead, these two employees were engaged in concerted activities as they were acting formally or informally on behalf of the employee group. *Oakes Machine Corp.*, 288 NLRB 456 (1988); *Whitaker Corp.*, 289 NLRB 933 (1988).

In considering all the record evidence, I find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Helen Perry. To support this conclusion, I note the following:

(1) The timing of her discharge is suspect since it follows closely her protected concerted activities and is consistent with retaliation by Gabbert. *Electronic Data Systems Corp.*, 305 NLRB 219, 220 (1991).

(2) I find that Respondent distorted and magnified Helen Perry's deficiencies. *Postal Service*, 256 NLRB 736, 738 (1981). As noted above, it is unlikely that the interrupted infomercial at 12:30 a.m. would have had any appreciable effect on Respondent's sweeps ratings or had any significant effect in any other way.

As a result of the exaggerated nature of Perry's offense, I find that Respondent's stated reason for her discharge was merely pretextual. See *McLane/Western, Inc. v. NLRB*, 827 F.2d 1423, 1425 (10th Cir. 1987) (prounion grocery employee discharged for eating a broken cracker from an unsalvable case in alleged violation of employer's antipilfering rule). When a Respondent's stated motive for its actions is found to be false, the circumstances "warrant an inference that the true motive is an unlawful one that Respondent desires to conceal." *Fluor Daniel, Inc.*, supra, 304 NLRB 970.

(3) Respondent's lack of clear, consistent uniform standards on applying discipline is evidence of discrimination and may be considered a pretext to mask discriminatory motives. *Monfort of Colorado*, 298 NLRB 73, 82 (1990).

(4) Illegal motive has been held supported by "variance from the employer's normal employment routine." *McGaw–Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969). Here the variance is proven by a termination for a relatively nonserious offense when Respondent's policy in the past has been toleration and condonation of misconduct for other employees not involved with the Union.

Moreover, Respondent has failed to show that it has treated employees in the past in a similar misconduct to the alleged discriminatee and this lack of proof has been held to be an important deficit in the employer's duty to meet its *Wright Line* burden and rebut the General Counsel's prima facie case. *10 Ellicott Square Corp.*, 320 NLRB 762, 775 (1996), enfd. 104 F.2d 354 (2d Cir. 1996).

(5) Finally, I place no credence in Helen Perry's past record of disciplinary offenses. This misconduct was condoned[14] where Helen Perry was appointed as alternate chief MCO, a position likely to lead to chief MCO. In addition Perry was entrusted with the prime-time shift. All of this reinforces my view, in accord with Gabbert's, an employee practically had to kill someone–before he would be fired.

d. Brian Shimetz' constructive discharge

To be sure, the two constructive discharges are closer cases than the discharge of Helen Perry. The case of Shimetz seems particularly weak since the reasons given for his objection to his transfer into Helen Perry's shift seen trivial—why couldn't he see his girlfriend on weekends—or legally insignificant–he didn't like his job as an MCO because the work was boring. Millions of others view their jobs in the same light, but they persevere for a host of different reasons.

The leading Board case on constructive discharge is *Crystal Princeton Refining*, 222 NLRB 1068 (1976), where the Board stated (id. at 1069) what must be proven to establish a violation:

> [There are two elements which must be proven to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

In reviewing the Shimetz case, I again consider the same background of the 8(a)(1) violations found above and I blend in Provenza's remark at a bar that Gabbert assigned Shimetz to the prime time shift to get him to quit. I assign less than controlling weight to this remark as there was no showing as to how Provenza arrived at his conclusion. I also consider the deviation from standard procedure in having Gabbert rather than John Perry assign Shimetz to the new shift. When all is considered, however, I find that the General Counsel has come up short and I will recommend that this allegation be dismissed. In support of this conclusion, I note the following:

(1) The change to the weekday prime-time shift did not create intolerable working conditions. Here Shimetz would have received the same pay and benefits as before. The question of whether he could have performed one or more days of production work with Provenza's permission had not yet been decided by the time Shimetz resigned. That Provenza was sympathetic to Shimetz' plight was shown by her remark giving her view to why Gabbert assigned Shimetz to that shift. Moreover, it had never been determined that Shimetz assignment was permanent to begin with, since John Perry, like Provenza, had helped Shimetz in the past. In fact, the assignment in question had helped Shimetz since he had complained to Perry in the past that he didn't want to work weekends. Unlike before where he had worked at least one weekend day, now he didn't work weekends at all.

(2) The arguable expansion of the constructive discharge doctrine contained in *American Licorice Co.*, 299 NLRB 145, 148 (1990), is unavailing. I assume for the sake of argument that the Board expanded the constructive discharge doctrine in *American Licorice* where the Board stated, "We do not believe, however, that the *Crystal Princeton* test can be read so narrowly as to apply only when an employer has changed an employee's working conditions." In *NLRB v. Grand Canyon Mining Co.*, 155 F.3d 1039 (4th Cir. 1997), the employee was transferred from the day shift to the night shift thus making transportation to his job unavailable. In affirming the Board's finding of a constructive discharge, the court noted the *American Licorice Co.* case where the employee was denied a transfer from the day shift to the night shift thus making child care unavailable. Lack of transportation to a job or inability to make child care arrangement differ from a convenient opportunity to see one's girl friend by two and one-half country miles. See also *NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319 (4th Cir. 1997). Compare: *Pioneer Recycling Corp.*, 323 NLRB 652 fn.

[14] *Virginia Mfg. Coleman*, 310 NLRB 1261 (1993).

2 (1997); *Cox Fire Protection, Inc.*, 308 NLRB 793, 802–803 fn. 2 (1992); and *Le Saint Jean Des Pres' Restaurant*, 279 NLRB 109, 122 (1986).

(3) Shimetz could not reasonably anticipate that he would be permanently locked into a shift and work assignment that he disliked. As the General Counsel concedes (Br. 60), Shimetz' reassignment in the past had sometimes been of relatively short duration and quite simply he had not given adequate time for his requests for periodic production work and a different shift to be considered.[15] Accordingly, I find no intolerable working conditions. Cf. *Aero Industries*, 314 NLRB 741, 742–743 (1994).

(4) Since Shimetz would not have had a to perform quality check work as a prime time MCO and since Gabbert had reconsidered any prohibition against reading while on MCO duty in response to Shimetz' postelection protest, Shimetz would have been able to continue reading whatever material he choose. This is additional evidence that the MCO duties were not so onerous as to force him to resign. Furthermore, as noted above, he could have seen his girlfriend on the entire weekend now free for however Shimetz choose to spend it.[16]

(5) Shimetz' request of Gabbert for a raise in pay after he learned of his new job assignment dilutes the force of the General Counsel's argument. Although Shimetz testified that he didn't know if he would have stayed if Gabbert had given him a pay raise—no amount was ever stated—I find that there is an implied statement to the boss that a pay raise would make a new job assignment more palatable and therefore it is reasonable to assume Shimetz would have been less inclined to resign.

(6) I also find that in light of my analysis above, it is unnecessary to perform the *Wright Line* analysis to the second element of *Crystal Princeton*. See *Davis Electric Wallingford Corp.*, 318 NLRB 375, 376 (1995). The employer must have acted with the intent to discourage union membership or activity. See *NLRB v. Bestway Trucking, Inc.*, 22 F.3d 177, 181 (7th Cir. 1994), and this question simply need not be answered.

In an attempt to shore up a weak case, the General Counsel also claims that Respondent's new timeclock policy and the assignment of quality checking were evidence of discrimination which somehow affects Shimetz' case. At page 64 of his brief, the General Counsel disavows any contention that the two changes in terms and conditions of employment were so onerous in themselves as to cause Shimetz to quit. However, the General Counsel claims that because they were discriminatorily motivated, they exacerbated an already hostile antiunion atmosphere.

Respondent had a timeclock system prior to the union organizing campaign. For two reasons, it fell into disuse. First, it frequently broke down and second, the installation of a new security door system which registered employees as they came and went using special ID cards rendered the timeclock system unnecessary. Even during the period of disuse, however, part-time employees had always filled out timecards and so did MCOs for overtime hours. Eventually as Pappas and others complained about breaks, Gabbert noted that employees who never exited the security door for lunch were not being punched in and out. So on April 15, Respondent issued a memo informing employees of a new timeclock system and how to use it (GC Exh. 11). I credit Gabbert's testimony that he waited until April 15 because he wanted some time to elapse after the election to make it less likely that any charge of retaliation would be found valid. I find that Respondent had every right to keep track effectively of its employees' hours, that employees were not prejudiced, and that this policy played no part in Shimetz' resignation (or Pappas' either). See *Bureau of National Affairs,* 235 NLRB 8, 10 (1978).

As to the quality checking, I have found above that Respondent tolerated the practice of MCO reading and when Shimetz objected at the February 20 meeting, to any change in the policy, Gabbert reconsidered making any changes. On March 13, Respondent issued to employees a memo which reads as follows:

> March 13, 1996
>
> Memo to: ALL MCOs
>
> Subject: Quality Checking/Program Timing
>
> *Effective immediately*, Master Control Operators will join in the timing and quality checking of programming for KOFY. There is more than enough time available during the MCO shift for this purpose!
>
> At this starting point, shows will be added to the *Overnight* and *Daytime* air shifts and the Prime Time shift will be kept clear of any timing.
>
> Just to set the system up—Paul Mular will provide 2 shows for each of the two MCO shifts. Since you are all aware of how a timing sheet should be, you can check these shows for quality, as well as develop a timing sheet for them.
>
> Paul will work the details out, such as where the shows will be stored (they WILL be brought to the hallway outside of Master Control) and so forth. In addition, he will work out a procedure for you to use when rejecting a show!
>
> Any comments?
>
> John Perry
>
> cc: Paul Mular
>
> [R. Exh. 4.]

Gabbert testified that he had learned of this practice from another station manager while attending a meeting out of state. This additional work took about 30 minutes per 8-hour shift and was thought by Gabbert useful in keeping the MCOs concentrated on their jobs. Moreover, it used up a certain amount

[15] In *Yearous v. Niabrara County Memorial Hospital*, 128 F.3d 1351 (10th Cir. 1997), an action was brought by a group of registered nurses, alleging constructive discharge in violation of 42 U.S.C.§ 1983. Finding no constructive discharge, the court relied in part on *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996), for the proposition, "An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged."

[16] I assume without finding that Shimetz' girlfriend's schedule was such that she was not available when Shimetz would have been off work during the prime time weekday shift.

of time freed up for the MCOs' shift after Respondent switched to the LMS technology.

Other than the timing element, I find no other evidence of discrimination in Respondent's implementation of this system. Moreover, since Shimetz worked mostly in production, except for the final 2 weeks that he worked as prime time MCO before his resignation, he was only slightly affected by this policy. As a prime time MCO, he was not affected at all, since prime time MCOs were exempt, so they could better concentrate on their jobs.

I find absolutely no credible evidence whatsoever that either the new timeclock or the quality check policy was part of the reason Shimetz resigned. Accordingly, I assign no weight to these factors.

e. Frank Pappas' constructive discharge

As I have recited above, Pappas resigned over a controversy involving his part-time job at KTVU, Channel 2. After considering all the facts and circumstances of this case (including Pappas' work history), I find that Pappas was constructively discharged in violation of Section 8(a)(3) and (1) of the Act. In support of this conclusion, I note the following:

(1) Respondent's alleged rule barring outside employment either did not exist or wasn't enforced prior to the union organizing campaign. *Horton Automatics*, 289 NLRB 405, 409 (1988).[17] The timing of John Perry's meeting with Pappas on January 19 to ask about the rumor he allegedly had just heard, a day or so after receipt of the Union's petition cannot be ignored. *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2d Cir. 1954).

(2) Respondent's alleged rule lacks a rational basis and is not followed in the industry. The number of other employees who, with Respondent's knowledge were permitted to work at outside employment without interference, establishes that the secondary employer, usually other television stations did not observe the alleged rule. This is particularly striking in the case of Pappas where Channel 2's management was not concerned about the possible loss of competitive advantage through purloining of sensitive information. Respondent's attempt to distinguish other outside employment situations for its employees is not persuasive. The claim that certain stations are not competitors or that certain jobs are not as vulnerable to the loss of so-called sensitive information is meritless. Respondent's alleged fear that Pappas might disclose prematurely that Respondent is courting a new client or preparing a certain commercial, or that Pappas could disclose rates charged Respondent's clients are all speculative and without any reasonable foundation. Compare *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950, 955–956 (7th Cir. 1976). Put another way, a new system for discipline (or enforcement of same) violates the Act if implemented in retaliation for union activity. *Performance Friction Corp. v. NLRB*, 117 F.3d 763. (4th Cir. 1997).

(3) Pappas' behavior does not constitute a defense for Respondent. Much of what Pappas did can reasonably be questioned. For example, his statement to Gabbert that he was no longer working at Channel 2 when he was only taking a week off. However, the falsity of a communication does not necessarily deprive it of its protected character. *Mitchell Manuals, Inc.*, 280 NLRB 230, 232 (1986). Thus, Pappas could reasonably have feared under the circumstances that Respondent was out to terminate him in response to his union activities.

Pappas' letter of May 24 (published above) (GC Exh. 21) can also be questioned for tact and judgment. Nevertheless, neither that letter nor any of Pappas' communications or behaviors were sufficiently opprobrious, defamatory or malicious to remove Pappas from protection of the Act. *Mitchell Manuals, Inc.*, supra, 280 NLRB at 232. Even if insubordinate, Pappas' behavior did not lose protection of the Act. *Earle Industries*, 315 NLRB 310, 313–314 (1994). To the extent that Pappas may have approached the line delineating unacceptable conduct, such conduct was provoked by Respondent's attempt to have him quit one or the other of his two jobs. See *Caterpillar, Inc.*, 322 NLRB 674, 677 (1996).

I also am not troubled by Pappas' reaction to Evangelista's attempt to call him at Channel 2 after he had called in sick to Respondent. First, I credit Pappas' testimony that he had been sick, but had recovered in time to attend his second job on the day in question. Accordingly, Gabbert's threat to subpoena the records or obtain them from his friend at Channel 2 was uncalled for and part of Gabbert's provocation.

In sum, I find that Respondent's attempt to force Pappas to choose between his two jobs on account of his union activities was so difficult and unpleasant as to force Pappas to resign.[18]

CONCLUSIONS OF LAW[19]

1. The Respondent, Pacific Fm, Inc. d/b/a KOFY, Operator of KOFY, TV-20, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, National Association of Broadcast Employees and Technicians–CWA, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. For all times material to this case, Provenza has been proven to be a statutory supervisor.

4. Respondent violated Section 8(a)(1) of the Act by

(a) Prior to the election, soliciting grievances with the express or implied promise of remedy.

(b) Blaming the union organizing campaign for delayed pay raises.

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[17] If the policy in question did exist, the evidence in this case establishes a regular pattern of overlooking certain violations of alleged company policy regarding outside employment, and therefore Respondent may not later rely on such violations to satisfy its *Wright Line* burden. *Carry Cos. of Illinois*, 30 F.3d 922 (7th Cir. 1994).

[18] In *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 432–433 (6th Cir. 1997), the court found that an employer's nondiscriminatory policy of not hiring applicants who simultaneously work for another employer does not violate the Act. See also *Willmar Electric Service*, 303 NRLB 245, 246 fn. 2 (1991), enfd. 968 F.2d 1327 (D.C. Cir. 1992), and *Sunland Construction Co.*, 309 NLRB 1224, 1232–1233 (1992) (Member Raudabaugh concurring). These authorities do not apply to the instant case since Respondent's policy not only was pretextual but was also enforced in a discriminatory manner.

[19] Regrettably the final chapter of this decision is yet to be written. In early October, local media reported that James Gabbert sold KOFY, TV-20 effective July 1, 1998. Even if this report is true, it should not affect the remedy in this case.

(c) Coercively interrogating employees about union activities or other protected concerted activities.

(d) Disclosing to employees prior to the election, Respondent's plan for the future to implement a 401(k) retirement plan.

(e) Misstating labor law to indicate futility of supporting the Union.

(f) Threatening to move production to another area, to subcontract work performed by unit employees and to lay off 12 employees if employees had selected the Union.

(g) Telling employees it would be futile to support the Union as Respondent would never sign a union contract.

5. Respondent violated Section 8(a)(1) and (3) of the Act by terminating Helen Perry and by constructively discharging Frank Pappas.

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

7. Other than expressly found herein, Respondent has committed no other unfair labor practices.

REMEDY

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

Having found that the Respondent's discriminatorily terminated employee Helen Perry and constructively discharged Frank Pappas, I shall recommend that within 14 days from the date of this Order, Respondent be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges and make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Pacific FM, Inc. d/b/a KOFY, Operator of KOFY, TV-20, San Francisco, California, its officers, agents, successors, and assigns, shall

1.Cease and desist from

(a) Prior to an election, soliciting grievances from employees with the express or implied promise to remedy.

(b) Blaming the union organizing campaign for delayed pay raises.

(c) Coercively interrogating employees about their union or other protected concerted activities.

(d) Disclosing to employees prior to the election Respondent's plan for the future to implement a 401(k) plan.

(e) Misstating labor law to indicate futility of support in the Union.

(f) Threatening to move production to another area; to sub–contract work performed by unit employees and to lay off 12 employees if the Union had won the election.

(g) Telling employees it would be futile to support the Union as Respondent would never sign a union contract.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Helen Perry and Frank Pappas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

(b) Make Helen Perry and Frank Pappas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Helen Perry and the unlawful constructive discharge of Frank Pappas, within 3 days thereafter notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a 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 Order.

(e) Within 14 days after service by the Region, post at its facility in San Francisco, California, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 1996.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the act not specifically found.