

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: January 24, 1989

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Jacor Communications, Inc., A Corporation
Owning and Operating WMJI and WBBG Radio Stations
Cases 8-CA-21288, -21356, and -21416

506-6050-6220
512-5090-2500
512-7587
601-7590-8100

These cases were submitted for advice as to whether an employer violated the Act by insisting that employees sign personal service contracts containing no-strike provisions that conflicted with a provision in the bargaining unit master contract.

FACTS

The Cleveland local, American Federation of Television and Radio Artists (the Union), represents a bargaining unit of five fulltime and two parttime radio broadcasters employed by Jacor Communications (the Employer). The most recent collective bargaining agreement expired on August 31, 1988. Consistent with industry practice, that agreement merely established a "foundation" of minimum wages and benefits for performers and permitted those employees to negotiate personal contracts directly with the Employer. Those personal contracts generally provided for benefits that were superior to the minimums established by the Union contract. AFTRA representatives do not participate in the negotiation of the personal contracts. AFTRA also does not sign the personal contracts. AFTRA merely requires that the personal contracts contain compensation levels that equal or exceed those in the "foundation" contract and that no other provision in the personal contracts conflict with or modify any aspect of the governing AFTRA contract.

Article 6.C of the most recent Union contract contained the following provision:

Each personal contract entered into between the Company and an Artist shall be deemed to include the following clause:

In the event that this individual contract is of longer duration than the current WBBG and/or WMJI Agreement, then, for such period of duration and until an agreement is concluded we covenant not to bring or maintain any action or proceedings against you, because you refrain from rendering your services under this contract by reason of any strike or work stoppage (whether partial or complete) called or ordered by AFTRA. In such event, we covenant (1) that neither AFTRA nor any of its representatives shall be deemed to have induced you to breach this contract, and (2) for the direct benefit of AFTRA and its representatives, we will not bring or maintain any action or proceedings against them, or any of them, based upon or arising out of the existence of this contract or out of your failure to render services under this contract. (Emphasis added)

Article 6.D of the AFTRA contract requires the Employer to give the Union a final copy of any personal contract negotiated with a unit employee within 10 days of its execution.

On June 28, 1988,¹ the Union notified the Employer of its intent to terminate the then current collective bargaining agreement and to commence negotiations for a new contract. At that time, the Union had copies of two personal contracts, covering employees John Lanigan (effective from September 1, 1985 through November 30, 1988) and Michael Ivers (effective from September 16, 1986 through September 16, 1989). The Union also had a copy of a personal contract covering employee Daniel Deely that had expired on February 29, 1988. In a separate letter to the Employer, the Union requested copies of current personal contracts for Deely and any other unit employees who had such agreements. The Union repeated that request on July 21, 1988.

¹ All events occurred in 1988.

On August 17, the Union received a copy of a personal contract, effective from July 22, 1988 through July 17, 1991, between the Employer and Deely. That contract contained the following "contract termination" provision:

Section 4.1.1: [Termination] By the company in the event the employee refrains from rendering any of the services to the company as required herein because of any dispute, strike, slow down or work stoppage called or ordered by any union representing the employee.

On October 12, the Employer gave the Union a copy of a personal contract that Lanigan had executed in 1987 that contained the same termination provision, even though there had been no such provision in Lanigan's previous contract.² On October 20, the Union received a copy of another personal contract, covering employee Denis Cefalo a/k/a Denny Sanders, effective from September 18, 1988 through September 18, 1989. That contract contained a similar termination provision.

On November 16, after the Union had filed the instant Section 8(a)(1), (3) and (5) charges, all of which attack the termination provisions as well as various Employer actions related to the negotiations for a new contract, the Employer gave the Union and employees Lanigan, Deely, and Cefelo copies of the following memorandum, which had been signed by the station manager:

WMJI and Jacor Communications wishes [sic] to advise you that the "standard" no strike clause in your contracts...is a nullity. Your rights in this regard are governed by the recently expired collective bargaining agreement with AFTRA and the National Labor Relations Act.

The Employer gave the Union a draft of a personal contract for another unit employee, Tony Rizzo, on December

² It is not clear why Lanigan signed a contract in 1987 when he was then already covered by a contract that was effective until 1988, as noted above.

7. That draft did not contain Section 4.1.1 or the termination language quoted above. Rizzo has not yet signed that contract.

The Union and the Employer are continuing to negotiate for a new "foundation" contract. However, the Region has concluded that complaint is warranted, absent settlement, concerning some of the allegations in the instant charges. The Region has also concluded that the Employer insisted upon inclusion of the termination provision in the personal contracts.

ACTION

A Section 8(a)(1) complaint is warranted, absent settlement, regarding the Employer's insistence on inclusion of the termination provision in the personal contracts.

Initially, we concluded that Section 4.1.1, which gives the Employer the right to terminate a personal contract if an employee strikes, constitutes an attempt to force an employee to waive his Section 7 right to engage in a strike. Furthermore, the Employer acted unlawfully in negotiating a personal contract that conflicted with the collective bargaining agreement. J.I. Case v. NLRB, 321 U.S. 332 (1944). The termination provision conflicts with Article 6.C of the AFTRA contract, which states that the Employer will not "bring or maintain any action or proceedings" against an employee or AFTRA because the employee participates in an AFTRA-called strike. Termination of the personal contract would require the type of adverse "action or proceeding" that Article 6.C is clearly intended to protect an employee against if the employee strikes.

Next, we concluded that it is unnecessary to decide whether the Employer also violated Section 8(a)(3) and (5) by insisting on the termination provision because the remedies for such violations would not add to the Section 8(a)(1) remedy.

Finally, we concluded that the Employer did not cure its unlawful actions by issuing its November 16 memorandum.

Under Passavant Memorial Area Hospital, 237 NLRB 138 (1978), for a respondent to relieve itself of liability for unlawful action by effective repudiation, its action must be timely, unambiguous, specifically addressed to the coercive conduct, and free from other illegal conduct. The respondent must also adequately publicize its repudiation to the affected employees and give assurances that there will be no future unlawful interference with employee rights. Moreover, there must be no other unlawful conduct after publication of the repudiation. In the instant case, the Employer entered into personal contracts containing the termination provision in 1987 and 1988. Indeed, the Cefalo contract became effective on September 18. The Employer did not repudiate the termination provision until November 16, two months later, and then only after the Union had filed three charges attacking the termination provision. In these circumstances, we do not believe that the Employer's repudiation was timely or sufficient to eradicate the Employer's liability and obviate the need for a remedial order.³

In summary, the Region should issue a Section 8(a)(1) complaint, absent settlement, attacking the Employer's insistence on inclusion of the termination provision in the personal contracts covering three unit employees.

H.J.D.

³ See also Auto Workers Local 376 (Emhart Industries), 278 NLRB 285 (1986).