

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

WXGI, INC., AND ITS SUCCESSOR  
GEE COMMUNICATIONS, INC.

and

Case 5-CA-27367

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 400, AFL-CIO, CLC

*Steven L. Sokolow, Esq.*, for the  
General Counsel.  
*Thomas H. Roberts, Esq. (Thomas H.  
Roberts & Associates, P.C.)*, of  
Richmond, VA, for the Respondent.  
*Jeffrey D. Lewis, Esq.*, of Landover, MD,  
for the Charging Party.

DECISION

Statement of the Case

THOMAS R. WILKS, Administrative Law Judge. The trial of this matter was held before me on April 20, 21, 22, and 23, 1998, in Richmond, Virginia. The unfair labor practice charge was filed on October 21, 1997, by United Food and Commercial Workers International Union, Local 400, AFL-CIO, CLC, here the Charging Party or the Union, against WXGI, Inc., here the Respondent WXGI or WXGI. On December 18, 1997, the Union filed an amended charge against Respondent WXGI and its alleged successor, Gee Communications, Inc. On December 23, 1997, the Regional Director for the Board's Region 5 issued a complaint against the Respondents which alleged as violations of Section 8(a)(1) and (3) the September 30, 1977 discharge by Respondent WXGI's agent and general manager, David Gee, of its on-the-air radio announcer personalities, Steve Giles, Wiley Southworth, Mark Matthews, and its sales account executive, Bobby Overman a/k/a Bobby Shannon, because of their actual and/or suspected organizing activity on behalf of the Union, which allegedly commenced about 5 days earlier and was made manifest by September 29, 1997.

The complaint, as issued, also alleges that Respondent WXGI, by its president and owner, Jay D. Keatley, violated Section 8(a)(1) of the Act at Keatley's home on September 30, 1997, by telling a terminated employee that the employees were terminated because they were "attempting to form a union." The complaint also alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by its agent Gee's statement to employees at the remote broadcast from the Virginia State Fair on September 30, 1997, that they were terminated because they were "attempting to form a union" and by Gee's conduct on the same date of creating the impression among the Respondent's employees that their union activities were under surveillance by Respondent WXGI.

At trial, the complaint was amended on the record to allege that the Respondent, by its attorney and agent, violated Section 8(a)(1) of the Act on April 17, 1998, by interrogating employees regarding their union activities and sympathies “without giving the warnings and assurances required by *Johnnie’s Poultry*, 146 NLRB 77 (1964), enforcement denied on other grounds, 344 F.2d 617 (8<sup>th</sup> Cir. 1965).”

The complaint also alleges in paragraph 4, as follows:

4. (a) On or about October 17, 1997, Respondent Gee purchased the assets of Respondent WXGI and since then has continued to operate the business of Respondent WXGI in basically unchanged form and has employed as a majority of its employees individuals who were previously employees of Respondent WXGI.

(b) Respondent Gee was put on notice of Respondent WXGI’s potential liability for its unfair labor practices through David Gee, who served as General Manager of Respondent WXGI and is President of Respondent Gee.

(c) Based on the conduct and operations described above in paragraphs 4(a) and (b) Respondent Gee has continued the employing entity with notice of Respondent WXGI’s potential liability to remedy its unfair labor practices, and is a successor to Respondent WXGI.

The Respondents timely filed a joint answer wherein the commission of unfair labor practices was denied and also the allegations of paragraph 4.

At the trial, the parties were given full opportunity to adduce relevant testimonial and documentary evidence and to argue orally. They were also afforded opportunity to submit post-trial briefs. The General Counsel, the Charging Party, and the Respondent filed briefs of 95 pages, 58 pages, and 37 pages, respectively. The Respondent’s and the Charging Party’s briefs were received at the Division of Judges on July 8, 1998. The Counsel for the Acting General Counsel’s brief, which was mailed on July 7, 1998, was received there on July 9, 1998. The due date for filing of briefs had been extended to July 8, 1998.<sup>1</sup>

Based upon the entire record, the briefs, and my observation and evaluation of the witnesses’ demeanor, I make the following findings.

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<sup>1</sup> On July 14, 1998, the Respondent filed a motion to strike the Charging Party’s brief as having been untimely filed. That motion is denied as nonmeritorious, as argued in the response briefs of the Acting General Counsel and the Charging Party and as is evident by the plain language in Board Rules Section 102.114.

On July 13, 1998, the Acting General Counsel filed a Motion to Strike Portions of the Respondent’s Brief as unsupported by record citation. The Respondent filed an opposition motion on July 20, 1998. Item one of the Acting General Counsel’s motion is denied for lack of merit. Item two, I find is meritorious. Accordingly, the Respondent’s reference in its brief to alleged “dishonest oppressive, and unfair” conduct by Counsel for the Acting General Counsel during the trial and during private off-the-record discussions between counsel before and during the trial unwitnessed by the Court, at pages 30-31 of the brief, are hereby stricken as inappropriate and improper.

## I. The Business of the Respondents

At all material times prior to October 17, 1997, Respondent WXGI, a Virginia corporation with an office and place of business in Richmond, Virginia, has been engaged in the business of operating a radio station that advertises goods sold nationally and subscribes to national wire services. During 1996, Respondent WXGI, in conducting its business operations described above, derived gross revenues in excess of \$100,000. During the same period of time, Respondent WXGI purchased services valued in excess of \$5,000 from other enterprises such as Bell Atlantic and State Farm Insurance, such enterprises being directly engaged in interstate commerce.

I find that at all material times prior to October 17, 1997, Respondent WXGI has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times since October 17, 1997, Respondent Gee, a Virginia corporation with an office and place of business in Richmond, Virginia, has been engaged in the business of operating a radio station that advertises goods sold nationally and subscribes to national wire services. Based on a projection of its operations since October 17, 1997, at which time Respondent Gee commenced its operations described above, Respondent Gee will annually derive gross revenues in excess of \$100,000. During the same period of time, Respondent Gee will purchase services valued in excess of \$5,000 from other enterprises such as Bell Atlantic, such enterprises being directly engaged in interstate commerce.

I find that at all material times since October 17, 1999, Respondent Gee has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. The Labor Organization

I find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## III. The Alleged Unfair Labor Practices

### A. Overview

In the fall of 1997, Jay D. Keatley agreed to sell his country music radio station to David Gee. Subsequently, Keatley allegedly attempted to withdraw from the sales agreement. Gee sued for enforcement. Under a settlement agreement prior to final sale, Gee became general manager, thereby demoting Bobby Overman a/k/a/ Bobby Shannon from the position of general manager to that of senior account executive (sales). Overman was also a sometime on-the-air personality and country music performer under the name of Bobby Shannon, by which name he is predominantly referred to in the record and hereafter in this Decision. The three remaining alleged discriminatees were employed at the time as the station's prime time (morning through late afternoon) on-air personalities, i.e., announcers and commentators of recorded country music played by them on the air and selected from a station library maintained by Shannon. These three employees were admittedly recognized by David Gee as a close-knit, cohesive group or clique, referred to by both him and one of his sale litigation attorneys as "the four." Gee furthermore recognized Shannon as the leader of the group and in his testimony characterized Shannon as the "catalyst" of his "problems" with the other members of the group of four.

During the fall of 1997, the group of four found themselves positioned, they felt adversely, in a power struggle between Keatley and Gee for ownership of the station. David Gee intended to make certain changes in station operation and programming format. He also planned to rehire a prior manager who had been fired by Keatley, John Trimble, whom the group of four despised as a "tyrant and dictator" and who also allegedly wanted to discharge three of the group of four.

As the bitter Keatley-Gee power struggle came to a close, three of the four admittedly feared that their jobs were in jeopardy and two of them approached a union, they claimed, for the purposes of employment protection. The Union they approached was not the American Federation of Television and Radio Artists, to which some other station employees had belonged in days past, but rather the Charging Party which ironically happened to be the station's largest account, i.e., 10 percent of all its sales, and also happened to have been the account solicited and serviced, at its request, by Shannon.

The discharge of the four was virtually coincidental with the formal transition of ownership of the station, Trimble's return to power, and the embryonic beginnings of union organizing activity, primarily by Giles with some limited support and discussion with Matthews and Shannon, the latter two of whom signed representation union cards. Southworth testified that he did not have the opportunity to sign a card or engage in union activities. The theory is that he was discharged, like Shannon, because of their group identification and suspected sympathy and support for the Union

Knowledge of Giles' and Matthews' union activity is premised upon an alleged admission verbally uttered to Matthews by Gee in the discharge interview at the Virginia State Fair's remote broadcast site, which allegedly had been witnessed by two of the Union's representatives who were on duty at the union display booth which was the broadcast site. Gee denied it. Knowledge is also premised upon an alleged comment by Keatley to Shannon after the discharge interview to the effect that Gee, with whom he was then feuding and estranged from, had known of their union organizing efforts of which, ironically, Shannon had little participation. Keatley subsequently died, and there were no other witnesses to the alleged conversation. Keatley's status as agent is thus an issue as well as the probative value of Shannon's uncorroborated testimony. Knowledge is further premised upon inference from Giles' and Matthews' open solicitation and wearing of union-legended buttons and placing of union stickers on their vehicle bumpers hours before the discharge, as well as timing.

In addition to Trimble's demands for the elimination of or restriction on the employment of three of the four, Gee testified to a variety of incidents on which he premised the discharges. The Acting General Counsel referred to more than 20 such defenses, many of which he argues were given in shifting, contradictory, and inconsistent testimony of Gee and in Respondent's pretrial position statement which was augmented by Gee who also testified as an adverse witness and a Respondent witness.

The main issues then are: Were the four, some of whom admittedly feared imminent discharge upon the acquisition of the station ownership by Gee and restoration to power of Trimble, actually discharged in consequence of that power struggle and a multiplicity of other reasons testified to by Gee, or were those discharges motivated by some of the fours' last-minute, incipient organization for the Union, the station's largest and most important client? Subsidiary issues are the agency of Trimble and the probative value of the alleged admission to Shannon in Shannon's testimony; the credibility of Matthews regarding Gee's alleged admission to him in front of two union representatives, and the successorship status of the Respondent

Gee with respect to remedial liability for the unfair labor practices of Respondent WXGI. The final issue is the alleged *Johnnie's Poultry* motivation.

5 With respect to credibility, there are problems with witnesses on either side of the issues that make the decision in this matter very close. For reasons set forth below, I find that the discharges were unlawful.

## B. *Facts—Discharges and Related Issues*

### 10 1. Background

15 In October 1996, David Gee, the future president of Gee Communications, Inc., began negotiations to purchase the WXGI-AM 950 radio station located in Richmond, Virginia, from its owner, J.D. Keatley. Keatley vacillated over whether to sell the station until March 1977, when he signed a purchase agreement with Gee. However, after signing the agreement, Keatley allegedly tried to rescind the agreement, and a lawsuit was filed by Gee to enforce the agreement. A settlement was reached between Gee and Keatley on June 17, 1997, pending a final litigation resolution. As part of that settlement, Gee was hired by WXGI, Inc. as the general manager until October 17, 1997, when Respondent Gee acquired ownership. It is Gee's 20 un rebutted testimony that Keatley personally introduced Gee to the assembled staff at the station as their general manager and that they were to cease following Keatley's directions.

25 Keatley remained the owner of WXGI and its licensee under the Federal Communications Commission regulations until October 17, 1997. As such, he retained the sole authority to sign the paychecks of the employees. He prepared the payroll and issued the paychecks from his home, not the radio station.

30 During the period of Gee's general management of Respondent WXGI until the finalization of the sale, Gee and Keatley developed an antagonistic relationship which ultimately, according to Gee, led to a court order on September 29, 1997, that barred Keatley from the station. Thus, even after the June 17 settlement agreement, the struggle persisted. Gee described it as a "stop and go" situation in which Keatley again vacillated with respect to consummating the sale. Their relationship became increasingly adversarial and led to a public shouting match between them in the lobby of the station on September 15, 1997. It was so loud 35 that Giles heard them from within his office where he joined Southworth in observing the spectacle. Keatley accused Gee of "crooked behavior" in their dealings and called him "one slick, bastard." Gee retorted that he was only holding Keatley to his word. Keatley called Gee a crook. Gee induced all four of them to move from the lobby to an inner office where a loud, emotional argument ensued between Keatley and Gee which included Keatley's criticism of 40 Gee's station management. Gee testified that he did not speak to Keatley thereafter until October 16, 1997.

45 Shannon testified that during the post-September 7 settlement pending litigation, both Keatley and Gee characterized the pending litigation in conversation with him as a "battle" and that he, Shannon, heard rumors that Keatley had threatened to blow up the station and that Gee had succeeded in obtaining a court order barring Keatley from visiting the station. Shannon admitted that he had his "ups and downs" with Keatley involving episodes of Keatley's criticisms of his work and behavior and Keatley's attempted evasion of commissions owed Shannon. However, Shannon testified that he hated to see Keatley "lose his station" to Gee. He characterized Gee's efforts to acquire the station from Keatley as an "illegal transaction." Yet, Shannon testified that Keatley was "dishonest where I was concerned."

Thus, Keatley and Gee's adversarial relationship was an open matter to the group of four, if not all the employees.

5 John Trimble had been previously employed by Respondent WXGI as a general manager. Giles characterized him as a "tyrant and dictator." Giles conveyed that opinion to his coworkers at the station and later directly to Gee. Southworth also considered Trimble to be a "total tyrant and dictator." Southworth testified that on three unspecified occasions prior to any announcement of Trimble's reemployment by WXGI, he engaged in conversations with Gee wherein Gee questioned him as to Trimble's managerial abilities, congeniality, and employee rapport during his previous tenure at WXGI. When Southworth replied "in the negative," Gee seemed perplexed and asked for an explanation

Southworth testified:

15 I told him [Gee] that it hurt me to say this but that John Trimble had turned into, in my words, a total tyrant and dictator, you could not -- he had no managerial experience prior to coming to WXGI. I am the one who brought him and affiliated him with WXGI. It had come back to haunt me and to serve as a major source of embarrassment for me because he had been just a total tyrant and dictator. He had not accomplished goals, nor had he achieved success; and, in the end, I found three days after the fact that he was going to fire me on one particular day as soon as I got off the air. And Mr. Keatley had come in the door while the conversation was taking place to that effect between John Trimble and David Holt, had intervened in that conversation and [Keatley] had given him [Trimble] his walking papers, as the saying goes, instead.

25 . . . Trimble was fired for trying to fire me.<sup>2</sup>

Southworth also testified that he characterized Trimble to Gee as a "terror" to work with but that he never told Gee he would not work for Trimble.

30 Trimble testified that he was employed as WXGI general manager from 1994 to 1996. His termination date is not specified. Giles had been employed by WXGI since 1989. Southworth testified he was hired on March 4, 1996. Matthews, a much younger, inexperienced person, was hired on some date in January 1996. Shannon's first employment with WXGI started in 1989 and ended in 1992. He returned in May 1997 as general manager. It is not clear whether Shannon was hired immediately upon Trimble's termination. The extent to which Matthews was exposed to Trimble's authority is not clear. Further, Southworth's testimony suggests that he was employed at WXGI before Trimble, but this is inconsistent with Trimble's testimony which dates his hiring as 1994, 2 years before Southworth testified that he was hired.

40 I conclude that the transcript contains an inadvertent error.

45 Trimble testified that immediately prior to his return to WXGI in October 1997, he had been employed at a radio station in Williamsburg, Virginia—WPTG—for 8 months. He testified that about that time Gee had contacted him about the possibility of returning to WXGI as an operations manager but that he declined in deference to his new employers who were his personal friends. He told Gee that he wanted to see what he could do at WPTG and then he

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<sup>2</sup> Trimble did not explicitly contradict Southworth but testified that Keatley forced him to resign "under duress." He explained that Keatley constantly threatened to cut his salary and he, therefore, resigned by walking out. He denied that he was discharged because of his personnel decisions.

would talk later to Gee about working at WXGI. According to Trimble, Gee kept in frequent telephone communication with him wherein he solicited Trimble's advice. In cross-examination, Trimble testified that his WPTG employers and he agreed upon his termination prior to his subsequent hiring by Gee. He testified that his sales solicitation deficiencies there were due to the fact that he could not sell himself better than he could "sell other people." Trimble testified that WPTG agreed to keep him on its payroll up until he actively started employment at WXGI.

Gee and Trimble met on September 1, 1997, at a fast food restaurant pursuant to Trimble's earlier inquiry as to whether the WXGI job offer was still open and Gee's affirmative response. Pursuant to Gee's prior request, Trimble presented Gee with a typewritten nine-page document entitled "John Trimble's Operating Proposal for WXGI Radio." It proposed that all current on-air personalities and control board operators be given notice of job termination on September 15, 1997, with a termination date of September 30, 1997, with the exception of Don Price and Phillip Ricker. It further conditioned that all new air personalities and board operators will be on the payroll October 1, 1997. The document referred to a new program format, the selection of all music by Trimble, the use of music charts, a new station identification announcement, the manning of program shifts, Trimble's compensation, special programming, remote broadcasts, etc. It also provided that Trimble would have the authority to select all air personalities, board operators, and sales employees and that he set sales goals and budgets, etc. The agreement was premised upon Gee's retention of his position as the station's general manager. Trimble's position title was to be "sales manager."

Gee's testimony reveals that he recoiled emotionally from Trimble's discharge demand. Gee testified:

Again Mr. Trimble without question is a good soul but my feeling of Mr. Trimble is he does have somewhat of a harsh hard edge on him, . . . I tried to give him my best thoughts back.

Gee testified that he attempted to "lobby" Trimble for the retention of some employees. He testified that he resisted the total discharge of 10-year veteran air personality and sales representative David Holt. He also testified that he argued for the retention of Matthews for an overnight shift or full-time weekend employment.

Trimble and Gee testified that they had discussed all the employees either on September 1 or in several telephone conversations that led up to that meeting. Trimble testified that he had given Gee his opinion that he did not approve of Giles because of Giles' alleged lack of sales experience and sales ability. This is a curious objection in light of Trimble's own admitted sales deficiencies. Holt also testified that he himself also lacked ability and desire for sales solicitations. According to Trimble, Gee had agreed to terminate Giles. Trimble, however, testified that he made the same sales experience deficiency argument with respect to Southworth and insisted that an announcer must also have radio experience and ability. Gee testified that Trimble complained that Southworth would not follow his orders. However, Gee testified that as of September 5, 1997, he decided that Southworth should be retained in some unspecified part-time position. Trimble testified that each of the group of four was discussed at the September 1 meeting. Trimble, however, testified that he had not been exposed to Shannon's work performance and had little to say about him in any event because it was Trimble's understanding that he was being hired to supervise the air personalities and would have no control over Shannon. Gee testified that as of early September, he intended to retain Shannon. Trimble testified that he insisted upon the replacement of Giles and Southworth but ultimately agreed to the placement of Matthews on an overnight satellite program feed or weekend on-air work.

5 Gee testified that he decided in early September to accommodate Trimble and to bring in a new replacement for Giles who did not possess full professional skills, i.e., sales skills, in which both Trimble and Holt were deficient. However, Gee testified that although he considered Giles to be “passive” in his work, he was “working hard at it” and would, therefore, be retained for casual or part-time work.

10 On September 9, 1997, Gee posted a cryptic announcement on the bulletin board maintained by Shannon in his station office. It invited the employees to welcome Trimble to the staff as sales representative and another sales representative, Carl Warren. When Giles discovered it, he summoned Shannon and Southworth into the room where they discussed it. Giles testified that he then proceeded out to the lobby and stated to the receptionist, Fran Davis, that he had some errands to run and that he had to provide transportation for another employee and would leave the station “for the time being.” He also told her that he just read something  
15 that he did not like and did not agree with and that he was not “very happy.” He told her that he would be back but “casually” stated to her, “I have enjoyed working with you” and “I’ll see you later in a few hours.” In cross-examination, he admitted telling her, “I do not know how much longer I will be around, or what have you. I was kidding with her . . . in a rather humorous manner.” He admitted, however, that his remarks and demeanor, despite the supposed humor,  
20 caused her to ask, “Well, what’s wrong?” He testified that he told her that he would not go into it but that, “I’m sure you’ll hear about it . . . down the road.”

25 Gee testified that Davis reported to him that Giles and Southworth had exhibited a strong reaction to the notice, that Giles apparently had resigned and left the station, and that Southworth had stated that he would not work for Trimble. She recommended that Gee should be prepared to have replacements for them the next day. Gee’s pretrial affidavit had Davis saying nothing about Southworth.<sup>3</sup> As a subsequent Respondent witness, Gee modified his testimony to incorporate some of Giles’ admissions, which Gee listened to at the counsel table, and, thereafter, he did not incorporate the Southworth statement although Gee claimed that  
30 Southworth reportedly walked out with Giles. Gee also testified that Davis had reported that Shannon was the cause of some sort of unspecified dissension among the staff. Gee described Davis as one of three persons who reported to him the divisive activities of the group of four. Gee testified also that Holt and Clellan Jarrell also reported back to him activities of some of the group of four. Thus, Gee admitted to having been aware of conduct by any of the group of four  
35 that tended to cause “dissension” and, by implication, any extraordinary activities by them.

40 Gee testified that on some unspecified date soon after the June 9 posting, Southworth told him that he would not work with Trimble. Southworth denied ever making such a categorical statement. However, telling an employer that you would consider working for a prospective manager you call a tyrant and dictator as a “terror” comes very close to it.

45 On September 15, Gee presented Trimble with a two-page, single spaced, typed response to Trimble’s September 1 proposal wherein Gee generally accepted Trimble’s proposed operating plan with the following exception.

Not to terminate present employees but, as under Paragraph 1, the present personalities will be informed that they are to be used as “on call” only, per John Trimble’s request.

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<sup>3</sup> At one point, Gee claimed Davis called the reaction “violent.” At another point, there is no reference by Gee to Davis calling anyone “violent.”

David Holt and Mark Matthews will be asked to take some regular schedule, but likely some week-end work.

There is no testimony that Gee ever informed Trimble that he had retracted this proviso.

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Gee testified that he decided to discharge Southworth from employment in any capacity sometime between September 15 and 26 because of Southworth's expressed hostility to Trimble, his participation in the group of "four" at the Shooters restaurant on September 21, 1997 (to be discussed more fully hereafter), reported to him by telephone by strangers but never investigated by him or confronted with the group of four, and reports from "a few loyal employees" that Southworth was part of "Shannon's team" which supported Keatley.

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Gee testified that he changed his mind about retaining Giles in some capacity after hearing the uninvestigated report of receptionist Davis, who was not called to corroborate his testimony, and after failing to confront either Giles or Southworth about the incident. Gee testified at one point that he decided to terminate Giles at the time of his conversation with Davis but that he would implement it at the end of the next 2-week pay period, i.e., September 30 when Trimble's new on-air staff would commence their duties. This testimony contradicts his unrescinded proposal to Trimble of September 15, 1997. Clearly, all conduct by Giles and Southworth on or before September 15 would have been condoned or tolerated to the extent that Gee proposed and argued for their retention in some employment capacity despite Trimble's alleged demands. When asked for any other reasons for the Giles discharge, Gee named the Shooters incident of September 21 which, of course, occurred after the date he said he already made the discharge decision. Gee also referred to the September 15 confrontation with Keatley at which he found as "mildly objectionable" some comments of Giles which are so innocuous as to deserve no comment herein and were in any event concurrent with the September 15 proposal to Trimble. Without specificity, Gee described Giles as continuously trying to "drive a wedge" and aiding and abetting Keatley's litigation position.

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On September 21, 1997, a restaurant-bar named "Shooters" hosted a reunion of a traditional, "old time," country music performers charity event. Although the restaurant was a client of WXGI, the station was not a sponsor of the event. However, Giles, Southworth, Matthews, and Shannon were present. Giles, Shannon, and Southworth served as masters of ceremonies.

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Gee testified that he received telephone reports from two non-employees of unknown status to the effect that the four had urged the Shooters customers to write the station and to complain about planned changes in the station's music format and to demand the status quo. Gee testified that he confronted Shannon with these accusations but that Shannon merely shrugged it off, admitting that he did so but that Gee should not be concerned.

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When testifying regarding Matthews' discharge, Gee described the Shooters incident as a "rebellion." When asked whether he confronted Matthews about it, Gee evaded the question by answering that at the time he had been having conversations with Matthews about his continued employment with Trimble's supervision. Gee failed to testify that he confronted Southworth and Giles about the incident.

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The testimony of the four alleged discriminatees generally attempted to characterize their various comments to the Shooters audience over the public address system as a mere

solicitation of both favorable and unfavorable criticism without reference to a predetermined prospective change in format.<sup>4</sup>

5 In cross-examination, however, Shannon testified that he heard Southworth announce to the public that there would be changes implemented in the music format by the station. In fact, after October 1997, Shannon admitted that there was a “big change” away from the manner in which the station identifies itself, i.e., away from a legendary country music format. Shannon further admitted that at Shooters, Southworth may have solicited the audience to write letters to WXGI management protesting their support of the status quo. Clearly, such conduct is not  
10 conducive to a carefully timed and crafted manipulation of musical listening habits of a radio station’s audience. Arguably, it consisted of concerted activity concerning their working conditions.

15 Despite Gee’s characterization of these remarks as a “rebellion,” it did not cause him to cease his discussions with Matthews about continued employment or to withdraw the offer he testified that he made to Matthews of such employment. Indeed, with respect to Matthews, he considered his Shooters’ suspected participation to be merely a “disappointment” and that the light was still “green” for Matthew’s retention until subsequent events of September 26 and 29. Clearly, his initial characterization of the incident as a “rebellion” was grossly exaggerated.

20 Matthews did not rebut Gee’s testimony with respect to conversations between the two of them on or about September 21 wherein Gee solicited Matthews’ attitude toward Trimble’s prospective supervision of him and Matthews’ retention of employment in another less-than-regular weekday, full-time capacity, i.e., the midnight shift. Matthews conceded that Gee had  
25 asked him about Trimble’s prospective assumption of authority over Matthews and, on September 15, discussed planned changes at the station and that he, Matthews, replied that he liked Trimble but that he “would not care to work for him.” Accordingly, Gee’s testimony with respect to a pre-union activity decision to reduce the employment level of Matthews, Giles and Shannon and to replace them with new regular announcers as demanded by Trimble must be  
30 credited and not dismissed as a concocted defense.

35 Matthews testified that the group of “four” socialized and rode to work together and that they all discussed and expressed among themselves disapproval of Trimble’s return to the station, which by now they admittedly suspected was to be a position of managerial authority. Furthermore, at the Shooters event, Southworth disclosed not only their awareness of changes to come with but also their antipathy to those changes by prematurely disclosing the plan to the public to arouse public opposition to Trimble’s plan, at least regarding the music format.

40 Southworth testified:

. . . it is my suspicion and suspicion only based on no evidence, that Mr. Gee viewed Bobby Shannon, Mark Matthews, Steve Giles and myself as a clique who were working in collusion to uproot him or his -- he envisions some type of conspiracy to oppose his ownership to the station, . . .<sup>5</sup>

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<sup>4</sup> Matthews had no recollection whatsoever as to what anyone stated.

<sup>5</sup> Southworth also speculated that somehow Gee learned of the union activity and associated Southworth with those activities and that also motivated his discharge.

Southworth's testimony completely substantiates the accuracy of Gee's state of mind regardless of the truth of the suspicion. Gee's testimony as to his perception of the "four's" motivation thus takes on an enhanced credibility.

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## 2. Union activity

The evidence clearly demonstrates that some members of the group of four had concluded by September 24, 1997, that their jobs were in jeopardy. Giles testified that he had concluded that his remaining days at WXGI were to come to a close soon with his discharge because Gee "had stated to enough people" within 15 days of his discharge that he was making changes and was rehiring Trimble. Giles testified:

So we had reason to believe that we would be terminated.

As was his custom, he moderated that statement by testifying that he expected some of the employees, but not all, would be terminated. He testified that on September 15, the employees discussed this proposal and every staff member, including Shannon, expected Trimble to acquire authority over them. In their discussions, Southworth expressed his expectation of discharge. Giles further testified that he and Southworth were the only two employees "that were greatly concerned that we were to be terminated." He further testified that he did not "foresee" the discharge of Shannon, the chief source of solicited station sales. As a basis for these conclusions, Giles cited a change in "atmosphere" starting on September 1 and increasing thereafter, the rehiring of Trimble, and the expressed opinion of every staff member, including Shannon and Matthews, that his authority would be expanded beyond that of a mere sales representative.

Giles testified that Shannon expressed fear that Trimble would disrupt the harmonious relationship built up when Shannon was the general manager.

Giles testified that he had thought that Matthews was liable to be discharged but then he had heard through the "rumor mill" that Matthews had been offered another position.

Thus, on September 24, 1997, 2 days before the opening of the Virginia State Fair at which WXGI was to operate a remote broadcast from the booth of its chief advertising client—the Union—the first contact with the Union was made. Shannon had solicited the Union's account and the Union had made it clear to Gee that it wanted its account serviced by Shannon, to the extent that it would increase its business with the station significantly. Gee testified that he was not altogether pleased to place Shannon in charge of the account, which for a time was Holt's and which Holt admittedly considered an onerous and unsatisfying duty. Gee testified that he explained to Holt that the station was "desperate" for the Union's promised increase in commissions. Gee testified that he could not resist the Union's offer and in the first part of September, he accepted and, by implication, decided upon Shannon's continued employment and thereby implicitly condoned a variety of alleged preexisting complaints he testified he had placed in Shannon's personnel file.

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Matthews testified that on Wednesday morning, September 24, Shannon introduced Matthews to Union Representative Paul Evans at a breakfast meeting in the dining room of a nearby motel. Also present were Union Business Agent Willie Snow and another person simply identified as Gregg. Matthews testified that at the meeting he and Shannon were given "a card" with which they did nothing at the time. Matthews testified that he probably threw his card in the back seat of his automobile and "left it for a couple of days" until on an unidentified date he signed, dated, and returned it to Evans. Matthews testified that he also picked up a union

bumper sticker from the Union's Fair booth. He testified that he placed the sticker on his car bumper on an unspecified date and drove to work thereafter with that car on at least three unspecified occasions. He testified that on an unspecified occasion or occasions he talked to three or four other control room employees "about the Union." He gave no details and identified no one. He failed to testify what he said or who else, if anyone, was present.

Giles testified that he made contact with Union Representative Evans at the union booth at the Fair on September 24. According to Giles, Evans, upon being approached by Giles, told him that Shannon and Matthews had already talked to him that morning about the prospective change in station ownership, the ongoing litigation, and "about the concerns that they had for the well being of the employees and job security for those employees." Giles testified that Evans stated that "he had suggested to them that we seek affiliation with the UFCW Local 400 as a means of helping to protect our job security and also to further our interest on the job if we retained our positions." In cross-examination, he testified that Evans stated "that there could be that possibility that we would be protected in the sense that action could be taken that would prevent us from being fired, . . ."

Giles testified that during his conversation with Evans, he received from him cards to be filled out by coworkers for the purpose of "expressing interest in [the Union] and affiliation." He testified that Evans also provided him with union bumper stickers and "some buttons" at that meeting. Matthews was silent as to the buttons. Giles testified that on an unspecified date he signed one of those cards and thereafter spoke "about the cards" to approximately eight or "perhaps nine" unidentified persons employed at the station from September 24 through Sunday, September 28, at unspecified locations. He did not testify what he said to them or what they said in response. He testified that seven unidentified employees returned signed cards to him.

Curiously, Matthews failed to corroborate Giles' hearsay testimony as to what was discussed at the alleged September 24 breakfast meeting between Shannon, Evans, Snow, and the unknown Gregg. Evans testified only in rebuttal to another issue and did not corroborate Matthews or Giles as to September 24 conversations. Snow testified as to a conversation between Matthews and Gee on September 30 but did not corroborate Matthews as to September 24 events. The unidentified Gregg did not testify.

Shannon not only failed to corroborate Matthews and Giles' hearsay account as to the events of September 24 but also contradicted Matthews as to how and from whom he received a union card and with whom he discussed the Union. He testified that he did not personally engage in any discussions about the Union with "people" "other than [about] the card" which he received from Giles at the station at an undisclosed location on an undisclosed date when they were alone. He testified to no other union activities:

. . . I signed a card that I would like to hear about it, you know, a hearing, or whatever you call it. A meeting.

Shannon did not testify where he signed the card or what he did with it. It is dated September 24 but he is unsure of its accuracy. Thus, his own testimony hardly describes his activity as at the enthusiastic forefront as suggested by Giles' testimony.

Southworth testified that he first heard of the Union on an unnamed date when Giles entered the station control room and urged him to sign a card that "indicated that would allow the Union to come and display its wares, so to speak, before us." Thus, he, like Shannon, did

not understand that the signing of a “card,” whatever it stated, either effectuated union membership or the authorization of union representation.<sup>6</sup>

5            Apparently Southworth was not even interested enough to hear the Union describe its function because he never signed the card which he considered to be a mere invitation to do so. Southwest testified that he was discharged before he had any opportunity to engage in union activities. If this is literally accurate, he would have been fired before Giles proffered him the card because that in itself is such opportunity. He testified that he believed he had been discharged because of Gee’s power struggle conspiracy suspicion and because Gee had learned that “. . . we were interested in hearing the Union’s message . . .” Thus, from what 10 Southworth had been aware, the only palpable union activities were an inchoate attempt to learn more about union representation. The Respondent’s witness, Holt, testified that he had observed no union-related activity in the station by anyone.

15            The General Counsel argues that Gee, however, suspected more of an organizing campaign threat had developed than even Southworth had been aware. Neither Matthews, Shannon, nor Southworth corroborated Giles’ testimony that he openly solicited as many as nine station employees to sign cards, of whom about seven allegedly did so. That group of nine probably included Shannon as well as Southworth. Thus, seven other unnamed employees are 20 alleged to have been solicited to support the Union in what the General Counsel and the Union argue to be in an open manner in a small, easily observable area.<sup>7</sup>

25            The opacity of Giles direct examination about his card solicitation cleared up a bit in cross-examination when he was demanded by the Respondent’s counsel to disclose what evidence he had of Gee’s knowledge of his union activities. Giles obligingly testified that his unspecified conversations with unidentified employees on unspecified dates and locations in the station were done openly and overheard on an unspecified number of occasions by unidentified persons who “were close to David Gee that would have the wherewithal [sic] to tell him about it.” He was not asked to expand and clarify this testimony in redirect examination. No foundation 30 or context was given for this speculative conclusion. However, there was no motion to strike it. Giles also testified that when he approached his coworkers, he did not caution them that anything was secret or to be withheld from Gee.

35            Giles testified in direct examination that he did not utilize the bumper sticker until Monday, September 29, when he also wore the union button. He failed to testify whether or not he had worn the union button before that date. Shannon, Matthews, and Southworth failed to testify as to any display of union materials by Giles. The yellow, black, and red printed sticker stated, “Union, Yes.” The buttons stated, “By American Shop Union.” Giles testified that he personally never before placed a radio station client’s advertising on his person or vehicle in the 40 past. There is no evidence that anyone else ever did so at the station. Giles testified that he saw the union bumper sticker on Matthews’ vehicle on September 30 and possibly before that date, but he could not recall with any certainty. Giles worked the 5 a.m. to 10 a.m. broadcast shift. Matthews worked the 2 p.m. to 6 p.m. shift. Southworth worked the intervening 10 a.m. to 2 p.m. shift.

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<sup>6</sup> Only Shannon’s card was proffered into evidence. It contains the usual authorization for representation by the Union. Shannon apparently was not interested enough to read what it actually and clearly stated.

<sup>7</sup> Employee Thomas Williams testified in regard to the *Johnnie’s Poultry* issue. He testified that he signed a union card but did not testify where, when, or for whom. He understood the purpose was simply to obtain information.

### 3. Concurrent significant events

5 In both examinations, as an adverse witness and the Respondent's witness, Gee testified that three incidents led to the discharge of Matthews. One was the Shooters incident described above. Gee testified that the second occurred on September 26 and involved a State Fair report incident and the third was a report he received on September 29 regarding alleged harboring of underage boys by Matthews at a shed or storage facility behind the station. Gee testified that the light was still "green" for Matthews' employment retention after the Shooter incident but started turning to "red" after the State Fair incident and finally turned completely red for nonretention with the report of September 29.

15 Gee testified that at the State Fair broadcast booth on Friday night, September 16, announcer Clellan Jarrell, radio evening staff broadcaster, reported to him an alleged statement by State Fair official D. Harmon to the effect that Matthews had informed Harmon that Keatley had discovered a loophole in the station sales contract whereby Gee would not obtain ownership. Gee testified that later in the evening at the broadcast booth, Harmon confirmed Jarrell's report. Gee testified that he was "disappointed" at this "public disclosure" and "disturbed." Neither Harmon nor Jarrell testified. Matthews worked the 2 p.m. to 6 p.m. broadcast shift and had departed. Gee made no attempt to confront Matthews either in person or by telephone regarding Harmon's report. There is no explanation as to what "loophole" Matthews might have alluded. Thus, as of September 29, Matthews had engaged in alleged behavior that merely disappointed Gee but which did not motivate Gee to discharge him.

25 Gee testified that he was in court on Monday, September 29, awaiting the opening of the hearing with Holt who was scheduled to testify. Gee testified that prior to the hearing, Holt approached him and told him he was worried because the station had a serious problem inasmuch as he had received a telephone call from a woman in the community. Gee testified that Holt described the woman as "disturbed" and quoted her as alleging that her 11 or 12-year old son and another neighbor boy had been harbored at the storage shed behind the station for 30 4 or 5 days and provided food, clothing, and drugs by an individual called "Cowboy," which is Matthews' air personality name. Gee testified that Holt had misplaced her name and telephone number and it took a few days to find it. This would appear to be a curious lack of diligence by a person who considered the report so alarming that he intercepted Gee who was busy preparing for trial. The reference to "Cowboy" was not in Gee's pre-trial affidavit.

40 Holt testified that he indeed receive such telephone call at the station and reported it to Gee in the courthouse hallway. However, according to Holt, there was no reference to a "Cowboy." Rather, the woman asked if the station employed a "Mark," to which Holt responded "Yes, Mark Matthews." Upon Holt's disclosure, the woman merely stated, "I guess." She did not explicitly tell him that Mark did the harboring or that an announcer was involved. Holt testified that he promised to investigate by looking for discarded clothes in the storage shed and that she gave him her telephone number and name which he wrote down and placed on his desk. He testified that he did indeed misplace it and that he did not locate it until 1 or 2 days 45 later at which time he gave it to Gee. He was uncertain whether he gave it to Gee before or after the discharge. He did not identify her to Gee when he made his report. Holt failed to testify whether he ever searched the shed.

Despite the discrepancies in the testimony of Gee and Holt, I must credit them that there had been a report whereby reasonable suspicion could be raised that she implicated an employee named "Mark" in the incident in some vague capacity, although not necessarily for responsibility. I do so because Giles grudgingly admitted that prior to the discharge, he himself



directed by Keatley, he would be replaced by a member of Gee's newly hired team. Giles testified that he told Gee that based upon statements Gee had made to him earlier, he had been expecting the termination but that he was "intrigued" because he was aware that Gee intended to retain certain employees previously hired by Keatley.<sup>8</sup> Giles told Gee he was making a mistake and the conversation ended except for some inconsequential discussion.

Southworth, as was his routine, was to replace Giles for the 10 a.m. broadcast shift after a 5-minute newscast. At about 10:10 a.m., Giles approached him, stating that Gee had just presented him with a letter of termination and stating, "I can't believe it, he's fired me." This is a curious response in light of Giles' own testimony that he was expecting to be discharged based upon earlier conversations with Gee. According to Southworth, Gee poked his head into the room and asked to see Southworth. The latter responded that he was presently on the air and it would be difficult to do so. He also stated to Gee, "I imagine you have a letter for me of termination; if that's the case, then bring it on in . . ." Giles then invited Holt into the room to replace Giles on the air. Southworth received his letter of termination and departed without further discussion. Clearly, the discharge was no surprise to him. The letter stated:

Based upon your strong objection and reaction to the station's decision to employee John Trimble I am terminating your present "work shift" assignment as presently enjoyed.

The last shift offered shall be that shift of September 30, 1977.

I feel you have given WXGI service above and beyond any reasonable expectation of an employer. Accordingly, it shall be my recommendation that the station offers you other opportunities at a later time that might suit an agreeably mutual schedule.

You are to be commended for your dedication, loyalty and commitment to a cause I know you fell very strongly about.

Neither Southworth nor Giles disputed with Gee the contents of their termination letters. Giles and Southworth did not ask and Gee did not explain to them just to what "cause" he considered them to be so dedicated. Perhaps they did not ask because they understood the "cause" to be their opposition to Trimble's restoration to power, i.e., Gee's suspected power struggle conspiracy. As the General Counsel argues, it could also refer to their union organizing activities of which Southworth, however, displayed very negligible, if any, commitment. Finally, the "cause" could simply mean Giles' and Southworth's commitment to an unchanged, traditional country music format. However, if Gee's reference to a cause meant a nonunion-related cause, he would reasonably be expected to testify so. He did not. The Respondent has thus left the meaning of Gee's termination language open to adverse inference.<sup>9</sup>

As was his practice, Matthews arrived at the State Fair's remote broadcast location in the Union's display and information booth about 15 or 20 minutes prior to his scheduled 2 p.m. broadcast shift. He telephoned the station to inform them that he had arrived and was ready to broadcast, but he was informed that Gee was en route to the broadcast site and that Matthews

<sup>8</sup> Certain employees like Jarrell and Holt were retained. However, there is no evidence that they openly denounced Trimble as a tyrant and dictator.

<sup>9</sup> As discussed below, the same language was used in Matthews' letter. There is little evidence of Gee's perception of Matthews as a strong opponent of Trimble or a staunch defender of the old music format, except for the Shooters' incident.

was to wait for him. Matthews testified that Gee arrived and approached him "in a very pleasant atmosphere" at the broadcast table and suggested to him that they retreat to another more private location where they could sit and have a soda. According to Matthews, Union Representatives Tom Rogers and Willie Snow were present with Matthews when Gee arrived.

5 Matthews testified that he rejected Gee's invitation on the grounds that he was about to commence his broadcast. In the presence of those union representatives in the union booth, Gee told Matthews that he was disheartened because Matthews had lied to and deceived him, had kept things from him, and that he had understood from "other reliable sources" and the "testimony" of other "folks" that he, Southworth, and Giles had come together to "form a union."

10 Matthews testified that Gee continued on to say that he was disappointed in them, that there were to be some changes, that they were not playing on his team, and that "until such matters were to be resolved," Matthews' position as an announcer for WXGI "was over." Gee then purportedly added that if Matthews should reconsider his position in the next 30 days, he would be welcome to "come to WXGI and sit down with him and discuss that at that time about future employment." Gee shook Matthews' hand and left. According to Matthews, Gee said nothing

15 about the alleged harboring of boys at the station or about any kind of investigation.

Matthews' testimony did not refer to the receipt of a termination letter. However, on September 30, Gee had prepared a termination letter-memorandum addressed to Matthews, which stated:

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I have decided to embark upon a new format change at the station that I feel is contrary to your preference. Concurrent with the desire of change, and your stated strong objection and reaction to the station's decision to employ John Trimble, I am

25 terminating your present "work shift" assignment as presently enjoyed. The last shift offered shall be that shift of September 30, 1997.

I am impressed and recognize your effort at executing your assignments during past 8-12 week! I feel you have given WXGI service above and beyond any reasonable expectation of an employer. Accordingly, it shall be my recommendation that the station offers you other opportunities at a time that might suit an agreeably mutual schedule.

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You are to be commended for your dedication, loyalty and commitment to a cause I know you feel very strongly about. I wish you the very best with your new endeavors and hope that your feelings of disappointment might be tempered to allow us to work together in the future.

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This termination for you is contrary to my stated desire to offer you continuous [sic] employment. The decision to terminate your employment comes with recent information of your behavior and remarks! I encourage you to reflect over the next 30 days and if interested, reapply to WXGI.

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Tom Rogers has been a member of the board of directors of the Union since 1991. What this amounts to is that he attends the monthly directors meeting. Otherwise, he is

45 employed full-time at a supermarket. He testified that he was present in the union booth at the Fair during the conversation and was standing 2 to 3 feet to the right of Matthews and Gee with Willie Snow, a coworker, to his left. Rogers testified that Gee told Matthews "that he had deceived him by not letting him know he signed up with the Union" and that he had already discharged Giles and Southworth and that he was not a team player [and] if he could be on the right team, he could reapply for his job in 30 days and he might consider rehiring him. Thus, Rogers' more shortened version of the incriminating admission refers to Matthews' "signing up" for the Union but not the multiple "forming" of the Union with Giles and Southworth. Notably,

both versions exclude reference to Shannon. However, Rogers' version gives some explanation of just what Matthews is to reconsider, i.e., if he realigned his loyalty to "the right team," he might be rehired. Gee never explained just what he wanted Matthews to reflect on or to do that would enable his reinstatement. Certainly, if Matthews had been guilty of improperly harboring underage youths, there is nothing he could do to erase past misbehavior. Of course, he could abandon support of the Union. As for supporting Trimble, he had not been perceived as strongly critical of Trimble as had been Giles and Southworth.

Willie Snow at the time was a business agent for the Union. He was retired from 16 years of union service when he testified. Snow admitted that all he could recall of the conversation was the "gist" of it. Contrary to Matthews, Rogers at first testified that Snow was not present at the start of the conversation but joined later. Rogers immediately amended this testimony by claiming that Snow may have been there first but walked away and joined later, explaining that the booth area is "pretty big."

Snow testified that when he walked up and first approached them, Gee and Matthews were already speaking. Snow testified that he heard Gee accuse Matthews of deceiving him by joining a labor union and that he would "no longer be able to use him, that he did not have his priorities right, and he was on the wrong team, and also that if he wanted to take some time and think about it and reapply in 30 days for his job, that he may take him back if he got his priorities straight." According to Snow, Matthews expressed concern whether he will be able to broadcast that day but that Gee told him that his listeners will be disappointed because he will not.<sup>10</sup>

In cross-examination by counsel for the Respondent, Snow reiterated all segments of his direct examination quotation of Gee's remarks except for the union-joining reference. Counsel asked Snow if those were all of Gee's exact words. He answered that they were all the exact words he could recall. In redirect examination, he reiterated the union-joining reference.

According to Gee, he told Matthews that he had embarked on a change in "format" and a new team and as of that moment Matthews was not on the new team. According to Gee, he stated to Matthews:

Mark, I know this greatly disappoints you because the last conversation that we had I had promised you that there might be some overnight and some spots, employment opportunities, and so this is contrary to what verbally I have promised to you and I want know that I have received some information that troubles me and it disappoints me and there are certain things that I must investigate; and Mark, if, in fact, the investigation that I am going to conduct proves not to be harmful to you, you will have a right in 30 days to come back to the radio station and, if you are interested, you can reapply.

Gee testified that the troubling information he had in mind at the time of the conversation was the report of harboring underage boys. However, he did not explain this to Matthews then or at any time later, despite his proffered intent to investigate. Just what kind of accurate investigation Gee expected to conduct without confronting the accused with the substance of the allegation was not explained by him. In fact, Gee claimed that he was so cryptic with Matthews that he spent "just a couple of minutes" discharging him. Gee made no attempt in his testimony to explain just why his letter-memorandum of termination failed to refer to any

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<sup>10</sup> Gee testified that he had arranged to bring Jarrell to the Fair as Matthews' replacement.

investigation, but rather predicated Matthews' reinstatement upon Matthews' "reflection" and not upon the results of an investigation.

5 Gee testified that it was his intent to speak to some union representative about his intent to replace Matthews, who was the Union's choice of announcer at the Fair for that time slot pursuant to contractual right. Gee claimed that he saw absolutely no union representative staffing the union display booth area, which he testified was "a quite expansive area that went on, as I recall, both sides of the aisle . . . at the exhibit hall." He claimed that he walked to the far end to find someone he believed was part of the Union. Upon his questioning, that person told him that Evans was not present.<sup>11</sup> Gee testified that he "absolutely did not" see Snow or Rogers present with Matthews during the discharge interview. Gee claimed that he was sensitive to preserving privacy because of the "difficult nature" of the interview and would have been aware of anyone within earshot range. Undoubtedly, this would have made sense, particularly more so if you are about to tell someone they are unlawfully discharged because of their allegiance to the organization for which two witnesses are employed. However, if 15 Matthews were alone, why did Gee feel the need to invite him to a private area to be alone? Moreover, people spontaneously motivated by a deep-seated hostility sometimes, in the heat of emotions, do things that do not make sense.<sup>12</sup> Yet, Matthews characterized the context as a "very pleasant atmosphere." Just how Gee's demeanor created such an impression while he made such a bald, public admission is indeed remarkable, particularly when the admission was 20 certain to alienate Gee's most remunerative client.

After Matthews' termination, there is no evidence of any criminal proceeding or even a police investigation. Gee testified that he subsequently interviewed the woman who had 25 complained "to see if the allegations were credible." He testified that the interest he had in doing so was because Matthews had filed a claim for unemployment compensation. Thus, he admittedly did not initiate an investigation as a prelude to rescinding the discharge as he allegedly so stated to Matthews. He investigated in preparation for a hearing regarding unemployment. The parties stipulated that the merit of the harboring complaint is not relevant to 30 these proceedings.<sup>13</sup> Thus, Matthews was discharged purportedly, in part, because of an uninvestigated complaint, the substance of which he was not informed.

As in the case of Giles and Southworth, Gee did not testify as to what was the "cause" he referred to in the discharge letters that he attributed to the three employees. 35

Shannon testified that at an unspecified time on Monday, September 29, he was broadcasting for the station at the State Fair. For some reason, Shannon telephoned Gee at the station. Shannon testified that Gee asked if he could come to the station. Shannon explained that he was alone and that there was no one to replace him in the broadcast booth. 40 Shannon testified that Gee replied that what he wanted to see Shannon about could not wait until tomorrow. Gee testified that the purpose of the summons to the office was to inform Shannon that he was discharged. As a Respondent witness, Gee testified that as of September 29, he had decided to discharge Matthews, Giles and Southworth. Having made

45 <sup>11</sup> Gee testified that he later telephoned Evans at his home and explained Matthews' termination and replacement to which Evans responded, "no problem." Evans testified that he was at the Fair from 9 a.m. to 11 p.m. and in the union display area except for relief breaks.

<sup>12</sup> Certainly, in varying degrees, Gee's letters of termination do not make sense and are inconsistent with his testimonial explanations.

<sup>13</sup> The stipulation necessarily means that the Respondent's reinstatement of Matthews was not related to the merits of the youth harboring complaint.

that decision, he explained that it was “time for a brand new team” and to “get rid of any potential problem” and to discharge Shannon as well. As an adverse witness for the Acting General Counsel, Gee testified that he decided to discharge Shannon on September 30, which he characterized as “judgment day.” But then he testified that he had previously prepared a discharge letter for Shannon. In his pretrial affidavit, he testified, “when . . . Bobby Shannon called on the 30<sup>th</sup>, he said he was busy at the station and could not come in to see me. When I got off the phone, I decided to fire Overman [Shannon].”

Thus, in that testimony, Gee, in effect, conceded that there had been no preceding fixed intent to discharge Shannon despite a variety of preexisting items regarding Shannon’s behavior that he testified that that he found he did not like, e.g., disputes with coworkers over commissions, Shannon’s use of free tickets provided by a client, dealings with clients, the Shooters incident, reports of his employee aggravation, etc. Somehow, something caused Gee to sit down and review Shannon’s personnel file on September 29 or 30 and decide to discharge him, but only after he had decided to discharge Matthews. Thus, in effect, Gee testified that he just decided he might as well eliminate the last of the group of four, i.e., Shannon, whom he characterized as the “catalyst” of that group.

Gee’s testimony revealed a particular intensity in describing his motivation for discharging Shannon. As an adverse witness, Gee testified that he decided to effectuate the discharge of Shannon on September 29 or 30, not because he refused to come to the office as summoned but because of his previous behavior and as part of “judgment day” for all of the group of four. Gee testified:

. . . the intent was to have — I had a new team coming in on the 30<sup>th</sup> and it was the end of the pay period.

The intent was to quickly get the four of them out of the station — to get their belongings out so that the new team could come in that afternoon a [sic] get prepared to go on the air the next day.

He testified that Shannon “appeared to be the catalyst in all my difficulties with some of the employees at the station, and it’s long stemming. It goes back to really the problem I had with Keatley.” He testified that a “tension” existed between former manager Shannon and himself, but this had existed prior to September 1997. He conceded that he considered Shannon to be the centerpiece of dissension at the station and close to Giles and Southworth, but reports from Fran Davis about Shannon’s abstract aggravation of dissension go back to September 9. Yet, Gee waited until he decided to discharge Matthews. That occurred on September 29 at the earliest. Gee did not testify just what behavior of Shannon caused discord, dissension, or tension, except for several instances of commission disputes wherein salespersons are arguing for a greater share of the commission pie.

Shannon testified that on September 30, he arrived at the State Fair broadcast site sometime after 10 and 11 a.m. and later saw Matthews preparing to go on the air at about 2 p.m. He observed Jarrell standing at the WXGI automobile parked nearby.<sup>14</sup> Next, from a

<sup>14</sup> Gee testified that after he discharged Matthews, Jarrell later reported to him that the union agents refused to accept Jarrell’s substitution for Matthews at the broadcast booth and, therefore, Jarrell departed. Thus, apparently there were some agents for the Union at the broadcast booth at about time the substitution was attempted, i.e., on the heels of the discharge. Gee’s hearsay testimony of Jarrell’s report is inconsistent with Gee’s description of

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distance, Shannon testified that he observed Gee talking to Matthews. He also saw with them union representatives he did not know by name except for one called "Tom." Shannon testified that he walked up and heard only part of the conversation, i.e., something said by Gee about 30 days and Matthews' response that he did not need 30 days. According to Shannon, Gee  
 5 became aware of Shannon and invited him to go outside to a little table located between the booth and the public restroom. Gee testified that after he told Matthews that he was discharged, he immediately walked out of the booth directly to where Jarrell was waiting 25 yards away and told him to take over the broadcast and departed. Jarrell, a current WXGI employee, was not called to corroborate Gee.

10 According to Gee, he notified Shannon of his discharge about 2 p.m. He uncertainly testified.

15 I think as I recall, Mr. Shannon was terminated first, and then Mr. Matthews. Yes, sir.

20 Neither Matthews, Rogers, nor Snow testified as to Shannon's presence about that time. If Shannon concocted his testimony with respect to the sequence of the discharge, the question arises as to why he did not go further and corroborate Matthews, Rogers, and Snow as to Gee's alleged reference to the Union. Finally, if all four of these General Counsel witnesses conspired to concoct testimony as to Gee's alleged incriminating admission, they did a remarkably very poor job of it considering inconsistencies and omissions in their testimony.

25 Shannon testified that at the outside table, Gee told him that he needed team players and that Shannon was not a team player. Shannon testified that he replied that he did not understand and asked if Gee were firing him. Shannon testified that he was so "shocked" and "stunned" that he could not recall what else was said but only recalled walking away. Shannon testified that at the time of this notification he did not understand why he was being discharged.

30 Gee's account of the discharge interview essentially tracks that of Shannon. He identified a letter-memorandum of discharge addressed to Shannon but which Gee did not bring to the discharge interview. It bears Shannon's signature of acceptance dated October 7, 1997, and Gee's handwritten notation.

35 P.S. Delivered this message to Shannon 9/30/97 at 2:10 P.M. at State Fair.

The letter states:

Re: Termination of Employment

40 On June 3, 1977, you and J.D. Keatley entered into a termination notice of your 4-25-97 contract of employment! As a further clarification of any intent on part of W.X.G.I., or Gee Communications, Inc. I now also reaffirm or establish the desire of W.X.G.I. to terminate its relationship with you!

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the scene immediately after the discharge. If Jarrell's report was accurate, those union agents must have been displeased by something that occurred or that was said by Gee in the discharge notification of which they either witnessed or were advised of it at the time, or for some inexplicable reason they did not personally like Jarrell.

Your last pay of this date is your last payment. Should income received by WXGI on the gross billings on your accounts at 20% exceed your draw for the month, WXGI will be indebted accordingly.

5           Gee's timing of the interview as of 2:10 p.m. indicates that regardless of the sequence, Shannon's discharge was either immediately before or after Matthews' termination. Since Gee did not explicitly deny Shannon's appearance in the booth at that time and his uncertainty as to the sequence, I credit Shannon as to sequence and his placement in the booth. Because of  
10           Gee's inconsistency with Jarrell's report as to his ejection from the site by union agents, the failure of Jarrell to corroborate Gee, the improbability of the Union's leaving its display booth unattended, especially during a remote broadcast, and Gee's request to adjourn to a private area, I credit the testimony of the Acting General Counsel's witnesses that they were all indeed present.

15           The September 30 Shannon memorandum referred to a June 3, 1997 Keatley-Shannon agreement to terminate their contract. Clearly, this event preceded Gee's early September decision to retain Shannon's services. Gee testified that after reviewing Shannon's personnel file, he had come to the conclusion that prior to June 24, 1997, Keatley and Shannon had  
20           mutually agreed to terminate Shannon's employment contract. However, as of that date, Gee claimed that Shannon "could bring some long-term value to the radio station . . ." <sup>15</sup> Gee testified that he accordingly drafted an employment agreement wherein he invited Shannon to accept continued employment under the terms set forth therein as account executive. The document was introduced into evidence. It bears the signature of Gee dated September 8, 1997, and that of Shannon dated September 18, 1997. <sup>16</sup> Gee testified that he and Shannon  
25           indeed spent many hours negotiating the agreement. In effect, the termination memorandum proffers no clear reason for Shannon's discharge.

          Moreover, Gee's acceptance of the employment agreement postdates numerous complaints, many of them bordering on the trivial, that Gee alluded to when questioned as to the  
30           reasons he discharged Shannon. Furthermore, there is no evidence that Gee explicitly rescinded that offer which remained outstanding. If there had been anything serious enough to motivate Gee to withdraw his offer, which had not yet been accepted by Shannon, Gee could have easily earlier done so and avoided an employment relationship that he variously and  
35           inconsistently testified he intended to terminate later based in part on conduct of Shannon before and after September 8 and before September 29.

          The thrust of Gee's testimony is that he suddenly decided to discharge his senior account executive who was responsible for most of its sales accounts at a time when the station was "desperate" for revenue. Furthermore, he did so for no specific recent behavior but merely  
40           because of Shannon's association with air personalities Giles and Southworth, with whom he perceived Shannon to be "closely" connected. Although there may have been prior incidents as grounds for complaint against Shannon, there was adduced into evidence no cogent, immediate motivation for Shannon's discharge other than group association. Although Gee testified to the hiring of replacement air personalities for Giles, Southworth, and presumably Matthews as full-  
45           time announcers, he testified to no prearranged replacement for his chief sales executive.

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<sup>15</sup> Despite Gee's admitted perception of a history of an adversarial relationship between Keatley and Shannon, Gee claimed that he subsequently identified Shannon as a leader of the pro-Keatley group.

<sup>16</sup> Shannon admitted, however, that he had never returned his signed acceptance to Gee because he and Gee were still negotiating the terms of the agreement.

Sales were outside the orbit of Trimble's authority and ability. Holt was admittedly deficient in sales ability, which Trimble highly valued. I conclude that had not Giles, Southworth, and finally Matthews been discharged, Shannon would not have been discharged despite whatever purported past complaints or resentment Gee had regarding him.

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Shannon testified that a few hours after his discharge, he went to Keatley's home to obtain his paycheck. According to Shannon, the following conversation occurred. Shannon asked Keatley if he were aware that Shannon had been discharged by Gee. Keatley answered yes, that he had been so aware and, furthermore, that Gee also "knows you all are trying to form a union," or something to that effect." Keatley asked, "what's going on down there." Shannon changed the subject, obtained his check, and departed. He admitted that his recollection was poor and he could recall nothing else. Upon leading examination, he testified that Keatley made some reference to Giles in regard to a union deal but he could not recall what it was. In cross-examination, he testified that Keatley may have referred to Giles' attempting to obtain union representation at the station and then asked him "what's going on," to which Shannon replied, "I don't know."

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#### 5. Testimony of attorney Beutler

Mark Beutler testified that he had been employed by the law firm representing the Respondent at trial until October 31, 1997, and had, in part, represented in the station ownership litigation. He testified that he and Gee had several conversations regarding the future employment status of the "four" during the summer of 1997 subsequent to the June 17 settlement. In those conversations, according to Beutler, Gee expressed a desire to replace all of the four. He testified that Gee vacillated on Matthews but unequivocally wanted to "get rid of Giles and Southworth" and "indicated strongly that he wanted [Shannon] to go as well."

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25

I find Beutler's testimony to be outright contradictory to Gee's testimony recited above. Gee claimed that he lobbied Trimble to retain Giles and Southworth in some form of on-call employment and, thus, he did not want to "get rid of" them. Gee testified that as of early September, he intended to retain Shannon and had executed a proposed employment offer to Shannon as late as September 8, which he did not retract until September 30 after he decided to terminate completely the employment of Matthews, Giles, and Southworth. I, therefore, do not find Beutler's testimony credible as to subsequent conversations with yet another attorney representing Gee before the FCC as to an ongoing effort up to September 29 to persuade that attorney to approve Gee's alleged longstanding, continuing expressed desires to sever completely the employment relations of three of the four. That attorney allegedly counseled against discharge for some obscure FCC licensing regulation concern despite the authority of management vested in Gee by virtue of the June 17 settlement. Not only did the Respondent fail to obtain the corroboration of that attorney but also Gee himself did not corroborate Beutler, presumably because he could not do so.

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#### C. Analysis—Discharge and Related Issues

##### 1. The Keatley admission—Respondent knowledge

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The Respondent argues, inter alia, that because of the open breach in the relationship between Keatley and Gee in the context of their ongoing adversarial litigation, that merely because Keatley was still the owner of WXGI, prepared and issued paychecks, his knowledge of union activities ought not be imputed to the WXGI discharge decision-maker—Gee. I

agree.<sup>17</sup> As to Shannon's credibility as to the Keatley post-discharge conversation, I conclude that he must be credited. He was clearly in a position either to concoct or embellish whatever the deceased Keatley had said to him regarding union activity without fear of contradiction. Similarly, he refused to embellish his testimony as to what he heard Gee tell Matthews  
 5 regarding the Union. Accordingly, despite his testimonial faults, I find that he is a basically credible witness, and I find that Keatley did make reference to the union organizing activity. Although I do not necessarily impute Keatley's awareness of it to Gee, I do find that it establishes first that despite the flaws in the testimony of Giles and Matthews regarding the degree and nature of the incipient union-related activities by them, such activity did occur and it  
 10 occurred openly enough and to such an extent that the reports of it came to the absentee owner.

I further find that the evidence in the record as a whole is sufficient to support an inference that Gee himself must have received the same reports. Gee admitted that Davis, Jarrell, and Holt reported to him a variety of behavior by the group of four which they considered to be divisive, tended to cause dissension, or constituted disloyalty. Therefore, it is perverse to not infer that they also reported to him Giles' and Matthews' open union-related activities regardless of the limited subjective understanding of the nature of union card signing by some of the group of four. This is particularly so because of the Respondent's failure to call these  
 15 employees, all under Respondent Gee's control, to testify as to precisely what they did or did not report to Gee. Therefore, I cannot credit Gee that he was oblivious to such activities.  
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The complaint alleges that by Keatley's alleged statement to Shannon on September 30, Respondent WXGI violated the Act by telling employees that they had been terminated because of union activity. Shannon's testimony does not support the factual allegation. Furthermore, as I have found, Keatley and Gee were too estranged for Shannon to have reasonably believed that Keatley was privy to Gee's motivation.  
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## 2. Gee's alleged admission to Matthews 30

Matthews' testimony standing by itself, if uncorroborated, could not stand up against trustworthy, convincing contradiction. Matthews' demeanor was confident enough in direct examination, but in a persistent cross-examination he appeared confused. At one point he admitted to having "no independent recollection" of the critical element of the conversation and his recollection of details was inconsistent.<sup>18</sup> Rogers and Snow corroborated him with respect to the essence of the conversation, if not in precise detail. This corroboration, however, was flawed by the inconsistencies noted above. Again, their testimony was liable to be dismissed if contradicted by credible, convincing testimony. However, both Rogers and Snow, who admitted their pronoun sympathies, exhibited an excellent spontaneous demeanor. They readily  
 35 admitted their recollective inadequacies and did not try to embellish what little they admittedly recalled.  
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I have already discredited Gee with respect to his denial of knowledge of union activity by members of the group of four and also his disingenuous denial of the presence of Rogers and Snow at the scene of Matthews' dismissal. It was typical of his testimony to exaggerate  
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<sup>17</sup> Keatley, in any event, was the owner and paycheck issuer whom Gee admitted had some managerial authority. As such, he was an agent of a party proponent and, as such, made an admission against interest to Shannon. As to the admissibility of Shannon's testimony regarding the deceased Keatley, see Federal Rules of Evidence, Rule 804(a)(4) and 804(b)(3).

<sup>18</sup> He was not asked for his definition of "independent."

and distort the facts to support the main point of his testimony. Gee's demeanor was not spontaneous, nor was it convincing and forthright. At times, it reeked of cumulative contrivances. He tended to give rambling, undisciplined discourses and tedious evasions instead of responsive, to-the-point answers. Gee's testimony throughout on almost all issues is riddled with internal and external inconsistencies, contradictions, evasions, and improbabilities. Furthermore, it was virtually uncorroborated by potential witnesses who, as employees, were under Respondent Gee's control but whom Respondent Gee failed to call to testify. Witnesses, who were called by Respondent Gee gave testimony inconsistent with or contradictory to Gee in important detail.

Gee's testimony with respect to the reason for the discharges were inconsistent with the sense of the written letter-memoranda notices of terminations. For example, Matthews' notification letter by no reasonable interpretation could be related to the last and allegedly final cause of his discharge—the improper juvenile harboring complaint. The inconsistencies in that testimony were discussed above in reluctant detail as was his testimony relating to Shannon's discharge which it precipitated, thus invoking the "day of judgement."

The argument is made that Gee would not make such incriminating admission to Matthews in front of two union representatives. This assumes that Gee, at that time, understood that his announcers were employees protected by the Act. His attorney on the sale understood it, but there is no evidence that Gee was so instructed. Furthermore, as noted above, Matthews' discharge was the spontaneous result of Gee's sudden discovery of a most recent action by Matthews. Gee acted hastily and was obviously so disturbed that it caused him to suddenly change his mind on Matthews' continued employment in some capacity. Gee's memorandum-letter, as oblique as it is, tends to corroborate Matthews' testimony more than it does Gee's own testimony. Gee's failure to investigate the juvenile harboring complaint or to confront Matthews with it also tends to support the testimony of Matthews, Rogers, and Snow. It demonstrates that something recently occurred which was perceived by Gee to have adversely affected Matthews' commitment and loyalty to Gee's managerial regime. The facts necessitate a conclusion that that event was not the uninvestigated juvenile harboring report but rather the incipient union activity of Giles and Matthews.

In light of my conclusion that Gee was aware of Matthews' recent connection to Giles' union activity, the fact that his memorandum-letter must be interpreted to refer to it, and the precipitous nature of the discharge convinces me that Gee was too besotted with vengeance to consider the incriminating nature of the admissions. Inasmuch as I find Gee's testimonial demeanor and his testimony as a whole to render him a less credible witness than Matthews, Rogers, and Snow, I credit the essence of their testimony that Gee orally clarified what his letter-memoranda implied, that Matthews was being terminated because of his disloyal support of the Union and that his discharge could be rescinded if Matthews recanted his union allegiance. No recantation occurred. Instead, an unfair labor practice charge was filed and the merit of the harboring complaint was, as stipulated, irrelevant to the issue of Matthews' reinstatement.

I find that by Gee's informing Matthews that he had been discharged because of his union activities, Respondent WXGI violated Section 8(a)(1) of the Act.

The complaint also alleges that Gee's September 30 statement to Matthews unlawfully created the impression of surveillance. I find such allegation incompatible not only with the facts but with the Acting General Counsel's and the Union's arguments that Giles and Matthews engaged in such open union activity at the worksite that Gee could not help be aware of it. I find that allegation to lack merit.

### 3. Discharge analysis

5 The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the Employer's adverse employment decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused that decision. *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 113 LRRM 2857, 2861, n. 7 (1983). It is not enough to demonstrate that a lawful reason may have existed. It must be proven that the lawful motivation actually motivated the adverse action. *Pace Industries, Inc.*, 320 NLRB 661, 662, 709 (1996), *enfd.* 118 F.3d 585 (8<sup>th</sup> Cir. 1997), S.Ct. 1299 (1998).

15 A prima facie case is made out when the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement that 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 (5<sup>th</sup> Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466; 470 (9<sup>th</sup> Cir. 1966); *Abbey's Transp. Servs. Inc. v. NLRB*, 837 F.2d 575, 579 (2<sup>nd</sup> Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7<sup>th</sup> Cir. 1984); *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

25 Motivation of union animus may be inferred from the record as a whole where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490-491 (7<sup>th</sup> Cir. 1993). *Data Systems Corp.*, 305 NLRB 219 (1991); *Fluor Daniel Inc.*, *supra*.

30 An inference of animus has been found to have been appropriately raised by timing, knowledge, and the manner of discharge implementation. *Sawyer of Napa*, 300 NLRB 131, 150 (1990), citing *NLRB v. Rain Ware*, 732 F.2d 1349, 1354 (7<sup>th</sup> Cir. 1984). Where a respondent vacillates in its position and, for example, deviates from proffered explanation in pre-trial position statements and later proffers different or additional testimonial explanations, ". . . an adverse inference may be drawn that the real reason for its conduct is not among those asserted." *Black Entertainment Television, Inc.*, 324 NLRB No. 177 (1977), citing and quoting from *Sound One Corp.*, 317 NLRB 854, 858 (1995); *Vulcan Waterproofing Company*, 327 NLRB No. 170, slip op., p. 11 (1999).

35 The General Counsel has established minimal union activities by Giles and Matthews. As found above, those activities were sufficient enough to have prompted rumors of an organizing effort to have reached Keatley and Gee. Gee associated all members of the group of four in any behavior he considered to be disloyal. Having knowledge of the "disloyal" activities of some of the group, he suspected that the others participated and he presumed, rightly or wrongly, that Shannon, who had been associated closely with the Union's advertising account, was the catalyst, i.e., the leader of disloyal behavior.

45 The General Counsel has also adduced evidence of animus toward the Charging Party Union, whatever Gee may have felt about AFTRA. As discussed above with respect to the Matthews letter-memoranda, the only sensible interpretation of that letter is that Gee

conditioned Matthews' reinstatement upon a change in his commitment to some cause and not upon the results of an investigation in the juvenile harboring report. That cause, because of the sequence of events, could only have been Matthews' perceived union activity. The same reference to a cause commitment is found in the letter-memoranda for Giles and Southworth, and the logical inference is that the identical language refers to the same cause, i.e., the actual or suspected activities of Giles and Southworth. Gee's admission to Matthews in the discharge interview merely confirms what the factual context necessarily infers, i.e., that Gee was so hostile to the incipient union activities that he abandoned his previous plans for which he had "lobbied" Trimble so urgently and now decided to completely terminate Matthews, Giles, and Southworth. No other reasonably explained and coherently detailed intervening event supports such a drastic change of position from that of September 15. Incidents such as the Shooters' event, the Trimble rehiring notice of September 9, and the juvenile harboring complaint were not taken seriously enough to warrant investigation and, except for a brief encounter with Shannon regarding the Shooters incident, not even a direct confrontation. Although the Shooters incident was characterized as a "rebellion," it admittedly did not necessarily preclude the retention of Matthews.

As found above, Shannon's discharge was the direct result of the decision to terminate Matthews, Giles, and Southworth.

Further inference of motivation premised upon union animus may be inferred from the Respondent's shifting reasons proffered in its position statement and in Gee's testimony and from the shifting defenses proffered in Gee's internally and externally, inconsistent, contradictory testimony of which a critical portion was not corroborated by witnesses under Respondent Gee's control or was contradicted by Beutler and Holt.

I find that the General Counsel has adduced sufficient evidence of knowledge, timing, animus, and shifting, false, and contrived defenses to support an inference that Giles, Southworth, Matthews, and Shannon were discharged because of the actual or suspected union activities of some or all of them.

I further find that the Respondents have failed to adduce credible, cogent, and convincing evidence that in any event, Respondent WXGI, by its agent Gee, would have deviated from his predetermined September 15 employment plans and would have totally terminated the employment status of those employees regardless of their actual or suspected union activities. Accordingly, I find that Respondent WXGI, Inc. violated Section 8(a)(1) and (3) of the Act on September 30, 1997, by rescinding the on-call and casual employment status of Giles and Southworth and the regular midnight and regular weekend employment status of Matthews that would have been effective upon the hiring of their replacements on October 1, 1997, as had been determined prior to union activities and by the discharge of Shannon from his position of senior account executive.

#### D. *Successorship*

The Respondents, in the brief, argue and cite relevant Board and court precedent as follows:

Successorship is a highly complex issue. The successorship analysis is "primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing & Finishing Corp. v. NLRB* [106 LC ¶ 12,333], 482 U.S. 27, 43 (1987). A new employer is a successor if there is "substantial continuity" between the enterprises. *Fall River*, 482 U.S. at 43. Substantial continuity exists when the new

company has “acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations.” *Golden State Bottling Co., Inc. v. NLRB* [72 LC ¶ 14,124], 414 U.S. 168, 184 (1973). “The essential inquiry is whether operations . . . remain essentially the same after the transfer of ownership.” *International Union of Elec. Radio & Mach. Workers (IUEW) v. NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979). The analysis “is undertaken with an emphasis on the employees’ perspective.” *Fall River*, 482 U.S. at 43. The analysis is further complicated because,

the real question in each of these “successorship” cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation that is at issue. . . . There is, and can be, no single definition of “successor” which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. *Howard Johnson Co. v. Detroit Joint Board*, [74 LC ¶ 10,066], 417 U.S. 249, 262-63 at n. 9 (1974).

To determine whether a “substantial change” has occurred, courts and the Board consider

whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River*, 482 U.S. at 43 (citations omitted.).

*Fall River*, supra, dealt with the successor’s bargaining obligation. *Golden State*, supra, dealt with the liability of a successor for the predecessor’s unfair labor practices. The Acting General Counsel, in the brief, sets forth the appropriate precedent and argument, and conclusions in which I concur and adopt, as follows.

A bona fide purchaser of a business who has knowledge of the seller’s unfair labor practices at the time of the purchase, and who continues the business without interruption or substantial change in operation, employee complement, or supervisory personnel has joint and several liability for remedying the seller’s unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 84 LRRM 2839 (1973). “Unlike successorship for bargaining purposes, this obligation does not require that a majority of the successor’s employees be former employees of the predecessor, and also does not turn on whether those employees are represented by a union.” *Bell Glass Co.*, 293 NLRB 700, 707 (1989). See also *Greyhound Taxi Co.*, 292 NLRB 267, 268 (1989); *St. Mary’s Foundry*, 284 NLRB 221, 221 fn. 4 1987) [*Commercial Forgings Company*, 315 NLRB 162 (1994)]. The successor’s liability includes the backpay and reinstatement of employees terminated in violation of Section 8(a)(3) of the Act. *Bell Glass*, 293 NLRB at 707. The requirement that the successor have knowledge of the predecessor’s violations is satisfied if an individual serves as a principal of both businesses. *Id.* at 708.

In the instant case, there can be no question that Respondent Gee had knowledge of Respondent WXGI’s actions with respect to the September 30 terminations. Thus, David Gee was the official of Respondent WXGI who terminated the discriminatees, and he is the owner and highest official of Respondent Gee.

5 Similarly, despite the Respondents' protestations, there is no doubt that Respondent Gee continued the business of Respondent WXGI without interruption or substantial change. In this regard, there was no change of personnel, format, music style, facilities, or management when Respondent Gee assumed control of the station on October 17. Tr. 208-10. If one considers the changes occurring after September 30, the date of the discharges, the same result obtains. Specifically, at least eight of the twelve non-supervisory employees working for Respondent WXGI in early October also had worked for that corporation on September 30, immediately after the terminations. Tr. 10 211-12. There is no dispute that Respondent Gee hired "a large number" of Respondent WXGI's employees. *St. Mary's Foundry*, 284 NLRB at 221 fn. 4.

15 As for the Respondent's operations, again there was virtually no change. Although Gee and some of the discriminatees agreed that the type of country music played by the radio station changed on October 1, both Respondents operated a country music radio station at the same facility with many of the same announcers. Furthermore, David Gee has been a high-ranking manager of the business since June.

20 In sum, Respondent Gee meets the definitions of successorship under *NLRB v. Burns International Detective Agency*, 406 U.S. 272, 80 LRRM 2225 (1972). *Golden State Bottling Co.*, and the Board and court cases interpreting those decisions. Accordingly, the Respondents are jointly and severally liable for the unlawful discharges of Giles, Southworth, Matthews, and Shannon.

25 I agree and so find.

30 Although the change of format from traditional or legendary country music to a more modern country music format may seem drastic to a devotee of the former, it was still modern country music, announced and played on the air to the same radio market audience from the same station building. Although "high tech" improvements and new equipment have been gradually implemented since October 1997, it has not altered the essential nature of this "employing industry" at the time of the takeover. Cf. *Pace Industries, Inc.*, supra, p.p. 710-711.

### 35 E. The Trial Preparation Interrogation

#### 1. Facts

40 As of the date of the trial, Thomas Williams was employed by the Respondent as a part-time announcer at WXGI. He was also employed elsewhere. On the Friday before the trial, April 17, 1997, he received at his home a telephone call at 10:50 a.m. from Trimble who told him this trial was to commence on Monday and Gee and "his attorney" would like to talk to him at the station between 2 and 4 p.m. Williams declined because of other commitments. Trimble then asked him, "Can you talk to him on the phone?" Williams said "sure." The Respondent's attorney then spoke on the telephone, introducing himself. Williams, without contradiction, 45 testified to the substance of that conversation.

The attorney, Thomas Roberts, asked whether Williams worked with Trimble and whether his working conditions were pleasant. Williams answered affirmatively. The Respondent's attorney then asked Williams if he "knew anything about a union forming with WXGI." Williams responded that the Union had been a longtime WXGI advertiser. Attorney Roberts asked whether Williams "filled out a union card." When he answered that he did, he was asked, "Were you going to form a union?" Williams testified that he "just had the

impression we were to get information.” When asked whether he received any information, he replied that he did not.

The Respondent’s attorney then asked Williams what he knew about Matthews. Williams referred to some innocuous general information. The attorney asked whether Matthews had a “wild life style.” Williams responded “not to my knowledge” and characterized Matthews as being a clean, punctual person who did a “good Job” and who worked beyond the hours assigned to him. Williams was asked if he knew Shannon, Giles, and Southworth, and he replied that they were all “nice people” and “hard workers.” The attorney then told Williams that if he talked to the Acting Counsel for the General Counsel, “just talk, you know, in his [Robert’s] presence.” Williams could not recall the exact words of this somewhat unclear statement. He could recall nothing further. The testimony in direct examination concluded:

Q. Was anything said about whether your participation in that conversation was voluntary?

A. No sir.

Q. Was anything said by the gentleman on the telephone about anything happening to you in the future with respect to that conversation?

A. No. No, sir.

In cross-examination, Williams testified that Roberts informed him that he did not have to speak to the Counsel for the General Counsel or to the Union’s attorney but was not informed that he did not have to speak with the Respondent’s attorney. He conceded that yes, he was asked if he were “willing to speak with the caller” and that he answered affirmatively. He also recalled that he was told by attorney Roberts that AFTRA was the union most radio and television personalities joined and he answered that he did not know and was “just in the dark on unions.”

Williams also testified that the Respondent’s attorney who cross-examined him stated, “You would think [the Union] if they would want you to join, they would take the time to get you the information,” to which he answered that he did not know anything about that. He admitted that he was asked no questions as to his “state of mind” or that would “pry into other union matters.” He testified that yes, he has hung up on callers with whom he did not wish to speak. When asked whether his participation in the telephone conversation was on a “strictly voluntary basis,” he answered: “Well, yeah. You’re right. I could have hung up.” However, he denied that it was made clear to him “that there would be no reprisal for cooperating with the Union . . .”

## 2. Analysis

The Board in *Johnnie’s Poultry* held:

In allowing an employer the privilege of ascertaining the necessary facts from the employees [in preparation for litigation], the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee’s subjective state of mind, or otherwise

interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enforcement denied, 344 F.2d 617 (8<sup>th</sup> Cir. 1965).

5 The Acting General Counsel correctly argues that the Board and courts of appeal have strictly followed that rule except for extraordinary circumstances, not present here, citing appropriately *Standard-Coosa-Thatcher v. NLRB*, \_\_\_ F.2d \_\_\_ (4<sup>th</sup> Cir. 1982); 111 LRRM 2987 *Le Bus*, 324 NLRB 588 (1977); L & L *Wine & Liquor Corp.*, 323 NLRB 848, 853 (1997). As was also correctly argued by the Acting General Counsel, the employees' subjective understanding of a patently coercive interview is irrelevant. *Miami Systems Corp.*, 320 NLRB 71, fn. 4 (1995).

10 The Respondent argues, incorrectly, that the *Johnnie's Poultry* standard is inapplicable herein because it is limited to interviews of intended witnesses of whom Williams was not included. However, the standard applies to investigatory interviews as well and furthermore to interviews with respect to the investigation of an unfair labor practice charge. *Le Bus*, supra, 15 598-599.

Williams' testimony was not the most confident, and his recollection was not the most assured. It was vulnerable to contradiction. However, the Respondent chose the role of litigator for its attorney and not that of witness. Accordingly, I must credit Williams. No explanation was given to Williams as to the necessary relation of the interrogation as to his and other employees' union activities to the scheduled trial. Williams answered Trimble that "sure," he would talk to attorney Roberts on the telephone, but neither Trimble nor Roberts explicitly told him that he was free to decline to do so.

25 The *Johnnie's Poultry* standard requires the Respondent to have made an affirmative assurance and not merely to have created a potentially ambiguous context from which the employee might infer that his participation was voluntary. That Williams could have 'hung up' on the attorney without explicit threat of reprisal or that he responded affirmatively to Trimble's investigation again without the same assurance falls short of an affirmative assurance.

30 It could also be argued that Robert's opening gambit of asking Williams if he considered his working conditions to be "pleasant" could reasonably be interpreted to contain a subtle suggestion that he should cooperate to keep it that way. However, for the above reasons, I conclude that on April 17, 1998, the Respondent, by its agent Thomas Roberts, coercively interrogated Williams concerning his and other employees' union activities in trial preparation investigation without complying with the *Johnnie's Poultry* standard and, thus, violated Section 8(a)(1) of the Act.

#### 40 Conclusions of Law

1. As found above, the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

45 2. As found above, Respondent Gee is a successor to Respondent WXGI with liability to remedy its unfair labor practices.

3. As found above, Respondent WXGI has violated Section 8(a)(1) and (3) of the Act and, further, I find such violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondents have not violated the Act in any other manner.

The Remedy

5           Having found that Respondent WXGI engaged in unfair labor practices in violation of  
 Section 8(a)(1) and (3) of the Act, I recommend that its successor, Respondent Gee, be ordered  
 to cease and desist therefrom and to take certain affirmative action designed to effectuate the  
 purposes of the Act. Having found that Respondent WXGI unlawfully discharged Bobby  
 10 Overman a/k/a Bobby Shannon from his position as senior account executive and having found  
 that Respondent WXGI unlawfully rescinded its intention of continuing the employment of Steve  
 Giles and Wiley Southworth on a casual, on-call basis and Mark M. Matthews on a regular  
 weekday midnight shift and regular weekend basis after lawfully terminating their full-time day  
 shift positions on about October 1, 1997, I recommend that Respondent Gee be ordered to offer  
 15 Bobby Overman a/k/a Bobby Shannon immediate and full reinstatement to his former position,  
 Steve Giles and Wiley Southworth to on-call, casual announcers, and Mark M. Matthews to  
 regular weekday midnight shift and regular weekend announcer, positions intended for them  
 effective October 1, 1997, or, if those positions no longer exist, to substantially equivalent  
 positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and  
 20 make them whole for any loss of earnings and other benefits computed on a quarterly basis  
 from the date of discharge to the date of proper offer of reinstatement, less any net earnings, as  
 prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New  
 Horizons for the Retarded*, 283 NLRB 1173 (1987).

25           On these findings of fact and conclusions of law and on the entire record, I issue the  
 following recommended<sup>19</sup>

ORDER

30           The Respondent, Gee Communications, Inc. (successor to WXGI, Inc.), Richmond,  
 Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

35           (a) Discharging employees and/or telling employees that they are discharged because  
 of their actual or suspected activities or because of the actual or suspected activities of other  
 employees on behalf of the United Food and Commercial Workers International Union, Local  
 400, AFL-CIO, CLC.

40           (b) Coercively interrogating its employees concerning their own and other employees'  
 union activities and about the subject of unfair labor practice proceedings.

          (c) 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.

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

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<sup>19</sup> 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.

(a) Within 14 days from the date of this Order, offer Bobby Overman a/k/a Bobby Shannon full reinstatement to his former position of senior account executive; offer to Steve Giles and Wiley Southworth the employment status of on-call, casual announcers, and offer to Mark M. Matthews the position of regular weekday midnight shift and regular weekend  
 5 announcer, positions that they would have been offered on or about October 1, 1997, had it not been for their actual or suspected union activities or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits computed  
 10 on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Bobby Overman a/k/a Bobby Shannon, Steve Giles, Wiley  
 15 Southworth, and Mark M. Matthews, and in 3 days notify them that this has been done and that the discharges will not be used against them in any way.

(c) 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,  
 20 timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Richmond, Virginia, copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by  
 25 the Regional Director for Region 5, 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  
 30 pendency 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 September 30, 1997.

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

Dated, Washington, D.C. August 25, 1999  
 40

45 \_\_\_\_\_  
 Thomas R. Wilks  
 Administrative Law Judge

<sup>20</sup> 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."

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 discharge employees and/or tell employees that they are discharged because of their actual or suspected activities or because of the actual or suspected activities of other employees on behalf of the United Food and Commercial Workers International Union, Local 400, AFL-CIO, CLC.

WE WILL NOT coercively interrogate our employees concerning their own and other employees' union activities and about the subject of unfair labor practice proceedings.

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

WE WILL, within 14 days from the date of this Order, offer Bobby Overman a/k/a Bobby Shannon full reinstatement to his former position of senior account executive; offer to Steve Giles and Wiley Southworth the employment status of on-call, casual announcers, and offer to Mark M. Matthews the position of regular weekday midnight shift and regular weekend announcer, positions that they would have been offered on or about October 1, 1997, had it not been for their actual or suspected union activities or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Bobby Overman a/k/a Bobby Shannon, Steve Giles, Wiley Southworth, and Mark M. Matthews, and WE WILL notify them in 3 days that this has been done and that the discharges will not be used against them in any way.

WXGI, INC., AND ITS SUCCESSOR GEE  
COMMUNICATIONS, INC.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 103 South Gay Street, 8th Floor, Baltimore, Maryland 21202-4026, Telephone 410-962-2772.