Retlaw Broadcasting Co., a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV, Channel 47 *and* American Federation of Television and Radio Artists, Fresno Local. Case 32–CA–12187

March 31, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 25, 1992, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Retlaw Broadcasting Co., a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV, Channel 47, Fresno, California, its officers, agents, successors, and assigns shall take the action set forth in the Order.

[1] Members Devaney and Oviatt note that while there is Board precedent which supports denying reinstatement and backpay where a discharge is lawful but where the respondent may contemporaneously engage in other unlawful conduct, *Redway Carriers*, 274 NLRB 1359 fn. 4 (1985); *Taracorp Inc*., 273 NLRB 221 (1984), this case is governed by *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), and its progeny since Haagenson was an applicant for employment at the time the illegal condition was attached to the reemployment offer.

Barbara D. Davison, Esq., for the General Counsel.
Thomas E. Campagne, Esq., of Fresno, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on April 28, 1992, in Fresno, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 32 of the National Labor Relations Board (the Board) on December 30, 1991, based on a charge filed on November 15, 1991, and docketed as Case 32–CA–12187 by American Federation of Television and Radio Artists, Fresno Local (the Charging Party or the Union) against Retlaw Broadcasting Co., a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV, Channel 47 (Respondent). The due date for submission of posthearing briefs was extended to July 21, 1992.

The complaint alleges that Respondent threatened to retaliate against an employee because he sought to enforce the overtime provisions of the collective-bargaining agreement and offered to rehire an employee only if the employee agreed to waive his right to file a grievance and/or right to go to the Union for assistance for any future termination of his employment. The complaint alleges this conduct as violative of Section 8(a)(1) of the National Labor Relations Act (the Act).

The complaint further alleges that Respondent discharged its employee Gene Haagenson on October 22, 1991, and has since that date failed and refused to reinstate him to his former position. The complaint alleges this conduct was undertaken by Respondent because Haagenson joined or assisted the Union or engaged in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, including seeking to enforce, inter alia, the requirements of the collective-bargaining agreement in violation of Section 8(a)(3) and (1) of the Act.

Respondent admits the discharge of Haagenson as alleged but denies that his discharge was for reasons impermissible under the Act. Respondent further denies the conduct alleged to violate Section 8(a)(1) of the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record herein, including helpful briefs from the General Counsel and Respondent,[1] and from my observation of the witnesses and their demeanor, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has been a California corporation with an office and place of business in Fresno, California, where it has been engaged in the operation of a television broadcasting station. Respondent as part of its business operations annually enjoys revenues in excess of $100,000, holds membership in or subscribes to various interstate news services, including the Associated Press, advertises various nationally sold products, and transmits programing originating outside the State of California. Respondent is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

[1] Counsel for the General Counsel filed a motion to strike a portion of Respondent's brief which motion Respondent opposed. The motion is denied.

[2] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence. Testimony was limited to that of Drilling, Faulder, and Haagenson. No others testified.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

KJEO-TV is a television broadcasting station serving the Fresno, California market. It is an affiliate of the CBS Network and broadcasts programming supplied by that network as well as its own local news. It is also a user of information supplied by the CNN news service. Donald Drilling has been for many years the vice president and general manager of Respondent. George (Bud) Faulder has been Respondent's news director since joining Respondent in January 1991. News Director Faulder does not have the power to fire employees. This authority was solely vested in General Manager Drilling. Terry Miller was at relevant times the assignment editor. Each of these individuals is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent.

Gene Haagenson came to KJEO-TV from a sister station in March 1990. During the events relevant herein he worked a 4-day week as a weekend local news anchor on Saturdays and Sundays and as a general assignment reporter on Mondays and Tuesdays at the direction of Assignment Editor Terry Miller.

The Union at relevant times has represented Respondent's employees who participate in television programs broadcast over its facilities. The union steward at relevant times was Jeff Sanford. The parties have had a series of collective-bargaining agreements the most recent of which was signed on February 6, 1991, and expires by its terms on July 1, 1993. The contract contains, inter alia, the following language under article 4.—Artist Status, Paragraph 4.02 Discipline & Discharge: Basis:

> the Company will discipline or discharge an Artist only for just cause or to reduce the staff. ''Just cause'' includes, but is not limited to . . . unsuitability of an On-Air Artist for the Company's broadcast requirements which judgment not be made capriciously. The determination by the Company that an On-Air Artist is unsuitable for its broadcast requirements shall not be challengeable by arbitration by either the affected On-Air Artist or AFTRA, except, however, as provided in Paragraph 8.03 (d).

Article 8, paragraph 8.03 (d)—Unsuitability provides for seniority linked severance pay and states in part:

> If the Company exercises its discretion in this regard, then the termination shall not be challengeable in any manner by arbitration or otherwise either by AFTRA or the affected employee.

The contract further provides ''Problem Adjustment'' procedures in article 11 culminating in binding arbitration. The article sets forth various time limitations for filing and processing grievances. The contract specifically provides in the last sentence of the last paragraph of section 11.05—Procedure: Arbitration: ''Any grievant who fails to met the time limits set forth herein shall automatically waive and abandon his entire claim.''

B. *Events Respecting the Overtime Issue*

1. Events to Sunday, October 20, 1991

Gene Haagenson testified that he normally worked four 10-hour days for Respondent. On those occasions when he worked more than 10 hours in a day or more than 40 hours in a week he had previously been paid overtime wages. In mid-October 1991[3] Haagenson testified that Terry Miller issued a ''verbal edict'' that no one was to work any overtime.[4] Despite this statement—apparently as a consequence of the unusual scheduling of the news following coverage of the World Series Baseball games—Haagenson was scheduled to work two 12-hour days followed by two 8-hour days.

Haagenson believed that he was entitled to overtime premium wages for his time in excess of his normally scheduled 10-hour days even though his workweek would not necessarily exceed 40 hours. Haagenson expressed this view to Miller who did not agree telling him, in Haagenson's recollection, that ''accounting had told him that was the way it was.'' In all events Haagenson testified he inquired about the matter to Respondent's accounting department on Friday, October 18 talking to Joan Armstrong in that office. Haagenson testified Armstrong told him she would inquire of General Manager Drilling about the issue.

Drilling recalled the series of conversations respecting Haagenson's overtime as occurring over the period of Friday, October 11 through Monday, October 14. Thus he testified that Haagenson had been scheduled to work 12 hours each day as a result of the Baseball World Series on the weekend of October 12–13 with a reduction in his scheduled 10-hour day to 8 hours per day on Monday and Tuesday, October 14 and 15.

Drilling testified that a week or two prior to Haagenson's termination Joan Armstrong in the accounting department came to him with a question about the number of hours per day that Haagenson could be obligated to work without paying overtime. She reported to him, in Drilling's recollection, that Haagenson had raised the matter with the accounting department. Drilling further testified that he asked Armstrong to give him the timecards and greater details respecting Haagenson's complaint and that she did so. He then told her that work in excess of 10 hours per day was to be paid at overtime rates. He also told his secretary to inform the station's department heads that he wished to speak to them about the ''correct protocol for daily versus weekly overtime . . . as stipulated within the collective bargaining agreement.''

Faulder testified that he spoke to Haagenson on October 14 about the overtime. He initially disagreed with Haagenson's position that overtime was to be paid on daily time in excess of 10 hours. After hearing Haagenson's argument including his assertion that both the steward and a California State Industrial Welfare Commission posting supported his view, Faulder consulted the contract and the posting. Faulder testified that he concluded Haagenson was correct and informed him of that fact. Faulder further testified that he thereafter told Drilling that he had make a mistake, that Haagenson was correct that he should receive overtime

[3] All dates refer to 1991 unless otherwise indicated.

[4] Miller did not testify. Faulder testified without contradiction that his overtime budget was several thousand dollars a month.

for work in excess of 10 hours per day and that Drilling said, ''Fine.''

2. Events of Monday, October 21, 1991

Faulder testified that he came to work on Monday, October 21 without being made aware of the meeting between Faulder and Drilling that morning described infra. He again approached Joan Armstrong in accounting respecting the overtime question. She said that she would have to talk to Drilling about it and to ''come back and see her later.'' A few hours later Haagenson returned. Armstrong nervously told him, in his recollection, that Drilling was going to hold a meeting to discuss the issue with department heads. Haagenson told Joan that he would ''check back later'' and left. Armstrong did not testify.

Perhaps a hour later, Faulder in the presence of Miller and other newsroom staff came to Haagenson's desk. Haagenson testified as follows respecting the conversation:

> [Faulder] asked me rather forcefully why did I take this overtime thing to accounting? Why didn't I take it to him instead. . . . I said, well, I had talked about the overtime situation with Terry Miller on Friday.
>
> And Bud [Faulder] asked Terry [Miller], is that true, did he talk to you about the overtime?
>
> And Terry said, yes. And Terry asked him, what's—what's the decision? Does he get overtime?
>
> And Bud said, yes, absolutely, we have to go by the terms of the contract.
>
> Terry then asked him if I then could stay for 10 hours that day instead of eight hours, as I had been scheduled.
>
> And Bud said, yes, absolutely.

Haagenson testified that about a half hour or so later Faulder called him into Faulder's office and the two had a conversation alone. Faulder, in Haagenson's memory, said he wanted to clarify how Haagenson was going to be paid regarding the overtime. Faulder explained that Haagenson would be paid for his hours in excess of his regular shift on Saturday and Sunday but that he would work 8 hours on Monday and Tuesday reducing his working week to 36 hours.

Haagenson recalled he answered by stating that shorter days were fine with him, but he did not think they were ''proper'' because as a regular permanent employee he was entitled to work 40 hours a week. Faulder became angry and asserted he could cut Haagenson's hours to 10 per week if he chose. Haagenson disagreed raising the terms of the contract. Faulder responded that the contract was optional and that ''you can ignore it if you want to.'' Haagenson agreed that Faulder could give him time off and left.

A few minutes later Haagenson spoke to Union Steward Jeff Sanford reporting that Faulder was claiming that the contract was optional and that employees were not entitled to 40 hours a week. Haagenson testified that Sanford responded that he would go and talk to Faulder and that he saw Sanford go into Faulder's office closing the door behind him and leave sometime thereafter. Sanford did not speak to Haagenson about the matter but rather ''rolled his eyes and shrugged.'' Sanford did not testify.

Sometime that afternoon Haagenson went to General Manager Don Drilling's office and there had a conversation with him alone. Haagenson testified he told Drilling that he did not mean to ''make a big deal about this overtime,'' that he was more interested in compensatory time off than overtime pay. Drilling answered that every hour of overtime was important to him because ''it is such a big part of our budget.'' He added in Haagenson's memory: ''I have no problem paying people for the time they actually worked.'' The conversation ended on that note.

Drilling and Faulder place all overtime events a week earlier as noted supra.

C. *Events Relevant to Haagenson's Work Performance and Discharge*

1. Sunday, October 20, 1991

Haagenson testified that due to network sports programming, the local news was to be delayed on Sunday, October 20, and, rather than Haagenson, the regular Monday through Friday news personnel were to present that evenings news program. Accordingly, Haagenson did not wear ''on air appropriate'' clothing to work that day.

In the early afternoon of that day, Haagenson learned of a fire in the Oakland, California hills of growing proportion through the comments of CBS network sports commentators broadcasting a football game being played in San Francisco, California.[5] Haagenson devoted his attention to this fire in preparing for the news broadcast to be aired that evening. He did not, however, deem it necessary to notify unscheduled news department staff of the developing story.

Haagenson testified that News Director George Faulder telephoned him at the station at about 4 p.m. that day and asked him if he was aware that the ''whole [San Francisco] Bay Area was burning up?'' Haagenson answered that he was aware of the fire. Faulder asked Haagenson what he was ''going to do about it.'' Haagenson responded that he was doing to make it that evening's lead news story. Faulder asked Haagenson where he was going to get the video.[6] Haagenson answered from the ''feeds.''[7] The conversation continued, in Haagenson's recollection, with Faulder becoming very angry:

> And so [Faulder] said, well, since you don't know, you know, what the hell you are doing, I want you to get on the phone right now and call CBS, call CNN, call KPIX, the station in San Francisco, and find out, you know, what the fuck is going on.
>
> And I said I didn't know what he meant.

[5] The October 20–21, 1991 Oakland hills fire was an extraordinary calamity involving the loss of many lives, thousands of dwellings, and related property.

[6] ''Video'' as used here is a reference to the recorded images and sounds of the events. The modern equivalent of film or ''footage'' video is now transmitted by means of satellite from sending station to receiving station(s) for recording, editing and broadcast.

[7] The network news departments, including CNN and CBS with which Respondent is associated, and local stations transmit video via satellite to authorized receivers including Respondent. Regularly scheduled transmissions are made and special transmissions are arranged with their scheduling announced by telex to the authorized receivers such as Respondent. Such transmissions are referred to as feeds.

> And he said, I want to find out about satellite feeds. And I said, there is a complete list of satellite feeds being offered by CBS, KPIX and CNN on the teletype. I have them right here. And that basically was the end of the conversation.

News Director Faulder's recollection of this conversation does not differ significantly. He recalled exhorting Haagenson to disregard the ''wires'' and network ''feeds'' because they would not produce ''much'' video until later in the day. Rather he told Haagenson to telephone KPIX, their affiliated station in the San Francisco Bay Area, and the CNN Network to obtain the necessary satellite coordinate information to ''grab'' their ''raw footage'' of the fire and related coverage. He also recalled that Haagenson told him that such action was unnecessary because he had the coordinates for the feeds from CNN and CBS.[8] Faulder testified that he found Haagenson's answers to his questions in the conversation were ''lackadaisical and nonresponsive'' and that during the conversation he grew ''extremely angry.''

Haagenson prepared a newsbreak with fire video and had given it to the control room director for insertion in sports programming when Faulder arrived at the station perhaps 15 minutes thereafter. Terry Miller, the assignment editor came to the station as did the Monday to Friday news anchor. They turned their attention to the fire coverage and Haagenson went back to putting the newscast together. The news aired as scheduled that evening. Haagenson had no further conversations with Faulder that day.[9]

2. Events of Monday, October 21, 1991

On the following day, October 21, 1991, between 8:30 and 9 a.m., before Haagenson had arrived at the station, Faulder testified he spoke to General Manager Drilling and asked him for permission to fire Haagenson for ''incompetence and insubordination'' ''on the spot.'' Faulder recalled he made it clear to Drilling that Haagenson had made no effort to aggressively cover the fire, ''deliberately ignored'' Faulder's instructions to contact the sister station or the networks, jeopardized the station's coverage of a major news story and made the entire staff look terrible.

Drilling, in Faulder's recollection, did not accept Faulder's recommendation. Rather he noted that Haagenson had been with Respondent, including his time at his previous station, for some 6 years and that he was likely ''trying to do the best job that he could.'' Drilling said that they needed to ''look at this a little differently.'' Drilling assured Faulder that ''we'll take the necessary steps, but we need to do what we can to make sure that Gene [Haagenson] is taken care of.'' At that point, in Faulder's recollection, Drilling ''came up with'' the language which was to become the Memorandum to Haagenson quoted in part, infra. The language was given to Drilling's secretary so she could prepare the final memorandum. Faulder further testified that the final memorandum was not completed in time to present to Haagenson before he left work on Monday, October 21.

Drilling generally corroborated Faulder's version of this conversation. He described Faulder as ''ballistic'' respecting the prior day's events and that he attempted to calm Faulder down. He further testified that he chose the language on the termination memorandum so that under the contract Haagenson would be qualified for severance pay. He further testified that he provided the options noted because he believed that in his industry it was easier to obtain new employment while still employed.

3. Events of Tuesday, October 22, 1991, and following

Haagenson came to work at about 9 a.m. and was sent to Faulder's office by Miller. There Faulder and Haagenson had a conversation. Haagenson testified that Faulder initially said that the overtime ''thing'' had nothing to do with his decision to let Haagenson go. He then handed Haagenson a document and told him he needed to read it over and think about the options presented for 24 hours. Faulder testified that he met with Haagenson at the beginning of work on Tuesday, October 22, because Drilling's secretary had not completed the final copy of the memorandum until Haagenson had left the station on Monday.

The document, a memorandum dated October 21, 1991, to Haagenson from Faulder titled ''Separation from KJEO-TV,'' states in part:

> After reviewing your failure to use ''common journalistic sense'' this weekend, as it pertained to the immediacy of the Oakland fire catastrophe, it is clear to me that the demands of our News operation are beyond your comprehension and capabilities. Along with recent research we completed,[10] which indicates that our audience finds your on-air performance lacking[,] I have concluded that you are unsuitable for future KJEO employment.

The memorandum then provided two alternatives, proposal A and proposal B. Proposal A provided for 5 weeks' pay and other severance payments pursuant to the collective-bargaining agreement. Proposal A meets the contractual requirements necessary to invoke its provisions respecting ''unsuitability discharges'' quoted supra. Proposal B provided for 4 weeks' of working severance, i.e., continued employment in lieu of contractual severance pay. The memorandum continued:

> Gene, if you chose ''Proposal B,'' I would recommend that you first consult with either your shop steward or AFTRA representative; since our ''Proposal B'' is not an option under the current Collective Bargaining Agreement, but rather, an attempt by the Company to offer you as much employment as possible, while you seek out other employment opportunities.

[8] It appears that Faulder was desirious of obtaining video as the local stations were transmitting it ''live'' to the CBS and CNN networks, in effect, in real time. It also appears that Haagenson knew he had sufficient information to receive rebroadcast, i.e. ''non-live,'' video from CNN, CBS, and KPIX. It is not clear Haagenson ever understood Faulder's request as a means of obtaining raw as opposed to rebroadcast video.

[9] Indeed Haagenson recalled no subsequent conversations with Faulder respecting that day's events save for a brief exchange the following morning in which each praised the work of a fellow employee who reported on the fire from the Bay Area.

[10] Certain polling research commissioned by Respondent was offered into evidence. It suggests that Haagenson was not the station's most popular on-air personality.

Haagenson testified he read the memorandum's reference to his performance during the Oakland fire. He asked Faulder what he did wrong respecting the fire since he ''thought everything went pretty well.'' Haagenson recalled the conversation continued:

> And he said, you know, well, that's why I am letting you go, because you don't have a clue.
>
> And I said, I mean, I don't get it, you know.
>
> And he said, we are just not on the same wave length.
>
> It was that kind of exchange.

The discussion continued with Haagenson suggesting he was experienced at various jobs within the news department so that ''there must be something else I can do.'' He further protested that it seemed ''severe to fire me because you didn't like the way I covered the Oakland fire.'' Faulder responded that Haagenson had not even done what he had been asked to do on that day. Haagenson responded that all he had been asked to do was make phone calls to other stations and that ''since I had all that satellite information, there was no need to call them.'' Haagenson recalled they ''went around and around a little bit'' and then he asked for and received permission to ''go home and sort things out.'' Faulder did not testify to the specifics of this conversation.

On the following day Haagenson testified he came to the station and initially attempted to speak to Drilling. Finding him occupied, Haagenson spoke to Faulder again alone in Faulder's office. Haagenson asked Faulder to reconsider. Faulder said, ''He didn't hold out much hope, but he would certainly think about it.'' Faulder did not address this conversation in his testimony.

An hour later Haagenson met with Drilling alone in Drilling's office. Haagenson pleaded his case asserting his tenure with Respondent and seeking a less severe form of discipline. Haagenson recalled Drilling asserted that while he ''didn't necessarily agree'' with Faulder, he had given Faulder ''complete control'' over the new room and ''that's the way it is.'' Drilling suggested however, in Haagenson's testimony, that if Haagenson elected ''Proposal B'' and worked at the station for a period, perhaps Faulder would reconsider the termination, if Haagenson did good work. Drilling confirmed a conversation with Haagenson similar to that described.

Haagenson testified he went into the station the following day and spoke to Faulder. He reported to Faulder Drilling's remarks and asked if Faulder might reconsider his termination if he elected proposal B and ''really proved himself'' during the 4-week period. Haagenson recalled Faulder said that he would ''think about it.'' Faulder did not address this conversation in his testimony.

Haagenson called Faulder by telephone the following day. Haagenson testified:

> I said, have you had a chance to consider giving me some hope that I might be able to stay on after the end of four weeks?
>
> And [Faulder] indicated that he had, but it would have to be on the condition that I would agree to waive my rights under the union contract to any kind of termination procedure after that.
>
> He said, I don't want you coming back for a month, and then a month later, you are slacking off and I have to fire you. And then I have to go through all the rigmarole. You know, you've got to agree. And I'm not—he said, I'm not sure that the union will let you, but you know, you see if you can do that. And those are the conditions under which I will consider rehiring you. That if you—only that you would go through this four-week period and then after that, I could, you know, basically terminate you at will.

Haagenson said he would think about it and the conversation ended. Faulder did not address this conversation in his testimony.

Thereafter Haagenson determined to accept ''Proposal A.'' He communicated this fact to Faulder by telephone on the following day. Haagenson testified he told Faulder:

> I just told him that I didn't feel I could go along with that. But to continue working for a few weeks with no guarantee of anything and then to—would be foolish. I would be better off taking the first proposal and getting severance pay and looking for another job.

Faulder did not address this conversation in his testimony.

On October 28, Haagenson returned to the station, signed the separation memorandum, collected his ''paperwork,'' and spoke to Drilling. Drilling told him, in Haagenson's memory, that ''he was sorry about this, didn't necessarily agree with it'' and asked why Haagenson had not chosen proposal B. Haagenson testified he told Drilling:

> I said, well, I just didn't feel like I could come in—I mean, I felt like I had been busting my butt the whole time I worked there. So I didn't see how what I could do differently in four weeks to make Bud [Faulder] change his mind. I thought that his standards for evaluating me were too subjective, and I wouldn't be able to please him anyway, so I might as well take the severance pay and look for another job.

Drilling testified that on October 28 he discovered that Haagenson was in the accounting department ready to sign the memorandum and looking for his severance pay. He spoke to Haagenson about Haagenson's election to receive severance pay but specifically denied ever telling Haagenson that he disagreed with Faulder's criticism of Haagenson or Haagenson's termination.

Haagenson received his severance payments and left the station. He had not been offered reinstatement as of the time of the trial. The Union filed the instant charge on November 15. No grievance has ever been filed regarding the events herein.

D. *Respondent's Motivation Testimony*

News Director Faulder testified that during 1991 through the October events noted above, he formed an impression of Haagenson as ''a typical small market reporter or individual who basically has reached the height of where he is going to go.'' Faulder described Haagenson as someone who ''unless you were prepared to beat him over the head with a sledgehammer, he was just not willing to listen or learn.'' He further testified that he had communicated his views of

Haagenson to General Manager Drilling. He added that at first he spoke to Drilling about simply removing Haagenson as a weekend news anchor and retaining him as a reporter. Drilling corroborated Faulder that they had discussed perceived inadequacies in Haagenson's performance. Later Faulder concluded Haagenson should simply be let go. By October both Faulder and Drilling testified Respondent was screening candidates for a weekend anchor position to replace Haagenson.

Faulder testified that Haagenson generally did not use initiative or ingenuity in obtaining and presenting news video. Thus rather than contacting other affiliated stations respecting equipment or video which might be utilized by Respondent, Haagenson tended to passively air network programming unmodified for the local market. Faulder testified that he did not find such behavior acceptable.

Faulder testified that this conservative or passive tendency in Haagenson was particularly manifest during the Oakland fire. Thus Faulder described the actions of another Fresno television station in broadcasting live or ''raw video'' received from that station's San Francisco Bay Area affiliated station as an active response to a major breaking story, and one which should have been matched or exceeded at KJEO.

Faulder testified that Haagenson's refusal to place the telephone calls Faulder has asked him to make during the Oakland fire events delayed the station's eventual obtaining and airing of ''live feeds'' or ''raw satellite feeds'' that were being sent from the San Francisco Bay Area news reporting to the Networks. A consequence of this delayed coverage was, in Faulder's testimony, a news disaster for Respondent for it revealed the station, in comparison to its competition, did not have an active, aggressive news department. Faulder testified in effect that he felt the news coverage of the events that day by Respondent was unprofessional. He testified that in the ongoing competition with other local news departments, Respondent was ''skunked.'' Finally he suggested that such a consequence resulting from Haagenson's passivity and refusal to take the action Faulder suggested was ''unspeakable in terms of our profession.''

Faulder further testified that his October 21 recommendation to Drilling that Haagenson be terminated ''on the spot'' was based entirely on the events of Sunday, October 20 which confirmed his earlier impressions of Haagenson and required, in Faulder's judgment, immediate action. He specifically denied that the overtime question or Haagenson's claims in that regard were in any way a factor in his motivation.

Drilling testified that his final decision to craft the memorandum giving Haagenson the choices noted supra was based on Faulder's recommendations of October 21 and his earlier conversations with Faulder respecting Haagenson's suitability for continued employment. He also specifically denied that the overtime issues and Haagenson's activities in that regard were a factor in his decision.

E. *Analysis and Conclusions*

1. The deferral issue

Respondent argues that the allegations of the complaint should be deferred to the grievance and arbitration provisions of the applicable contract. Thus, relying on Drilling's unchallenged testimony, Respondent asserts it has long had a productive relationship with the Union which has been sufficiently mutually satisfactory so that no cases have been taken to arbitration under the contracts between the parties. Respondent argues further that the contract's terms are sufficient to support an arbitrator's decision resolving all issues in the complaint.

The General Counsel asserts that on December 5, 1991, the Regional agent investigating the instant charge sent Respondent a letter with the following language:

> The charge filed in the above-captioned case has been assigned to me for investigation. Basically, AFTRA alleges that the Employer discharged Gene Haagenson in retaliation for his exercise of rights concerning payment of overtime under the parties' collective bargaining agreement. It is my understanding that no grievance was filed over this matter because the particular reason advanced by the Employer for Mr. Haagenson's discharge is specifically excluded from the grievance procedures.
>
> The Charging Party has advised me that it is willing to arbitrate Mr. Haagenson's discharge if the Employer will agree to do so and waive any arguments about timeliness or subject matter. If the Employer is willing to resolve this matter through the grievance procedure, I will recommend that the Region defer any further processing of the charge to the grievance arbitration procedure.

The General Counsel further contends and Respondent agrees that it was unwilling at the time of its receipt of the quoted letter or as of the time of the hearing to waive any defenses it may possess under the contract including timeliness arguments, arguments respecting release and acceptance of backpay and any other defenses it may wish to advance to the arbitrator.

The General Counsel argues from these facts that the case is not now susceptible to resolution in arbitration since Respondent possesses procedural arguments which it explicitly will not abandon and which, if asserted, would prevent the arbitrator from reaching the issues on their merits. Thus argues the General Counsel, since the merits of the issues underlying the complaint will not with certainty be ruled on by an arbitrator, the matter should not be deferred to the contractual dispute resolution process. Respondent argues that it should not be forced to abandon valid defenses in the arbitral forum in order to obtain deferral of the case.

The General Counsel's cited case on brief, *Johnson-Bateman Co.*, 295 NLRB 180, 181 fn. 6 (1989), and cases cited therein is dispositive. Given the procedural means to defeat a test of the merits, arbitration will not resolve the issues of the complaint.

Accordingly, I shall decline to defer the case to the grievance and arbitration procedures of the contract.

2. The allegations of the complaint

Paragraph 6(b) of the complaint alleges that Respondent through Faulder:

> (i) On or about October 21, 1991, at its Fresno facility, threatened to retaliate against an employee because

said employee sought to enforce, inter alia, the overtime provisions set forth in the Agreement;

(ii) On or about October 24, 1991, in a telephone conversation with an employee, offered to rehire said employee only if he agreed to waive his right to file a grievance or to go through the Union for assistance regarding any future termination of his employment.

This conduct is further alleged to violate Section 8(a)(1) of the Act.

Complaint paragraphs 7 and 8 allege that Respondent improperly discharged Haagenson because he sought to enforce the contract's overtime compensation provisions. This conduct is further alleged to violate Section 8(a)(3) and (1) of the Act.

3. The allegations of independent violations of Section 8(a)(1) of the Act

a. *Complaint paragraph 6(b)(i)*

(1) Credibility resolutions

Resolution of complaint paragraph 6(b)(i) requires credibility determinations respecting the conflicting testimony concerning timing and specifics of the overtime events and conversations noted supra. In making the findings appearing below, I have not concluded that any witness is speaking falsely about events. Rather I believe that recollections were not complete or precise and that different conversations were identified by different parties. Based on the record as a whole including the documentary evidence submitted and the probabilities of events given the recollections and demeanor of the witnesses, I find the follow sequence of events occurred.

In agreement with Haagenson, I find that the conversations at issue arose out of Haagenson's assigned hours during the World Series but did not occur until after October 15. I find that Haagenson spoke first to Miller after being assigned the 12-hour days. He then spoke to Armstrong on Friday, October 18 and on Monday, October 21. On the same day, October 21, Armstrong spoke to Drilling, Drilling decided the overtime should be paid, notified Armstrong of this fact and arranged for a meeting with department heads including Faulder to discuss the overtime issue. I find that the meeting was held that day and that Faulder learned of the overtime issue for the first time at that meeting. Crediting Haagenson's recollection of statements made, I find that Faulder spoke to Haagenson in Miller's presence[11] and had a second conversation alone with Haagenson shortly thereafter.[12]

In the second conversation Haagenson testified occurred on October 21, Faulder took the position that the contract was ''optional'' and that he was not obligated to give Haagenson 40 hours per week. Haagenson recalled that in the argument Faulder became angry and asserted he could cut Haagenson's hours to 10 per week if he chose.

I discredit Faulder's version of events to the extent that his testimony suggests that Haagenson simply came to him with the overtime argument and that after discussion and checking the contract and the state posting Faulder agreed with Haagenson without further disagreement. This version of events is inconsistent with the testimony of Drilling and Haagenson. Rather I find Faulder's recollection of his conversation with Haagenson is but a fragment of the conversation, identified by Haagenson as the second the two men had on October 21.

Faulder does not specifically deny the threat attributed to him that he could cut Haagenson's hours to 10 per week. Nor does Faulder's testimony suggest that the issue of management's rights to assign full-time employees less than 40 hours per week was discussed. It does, however, generally deny that the conversation was angry, threatening, or more than business like.

Considering the two versions of events in the context of the testimony of all the witnesses and the record as a whole, I credit Haagenson's testimony respecting this conversation. Thus I find that Faulder told Haagenson he could cut Haagenson's hours to 10 per week if he chose.

(2) Analysis and conclusion

The General Counsel argues this statement is an implied threat directed against Haagenson's protected activity of asserting contract rights. I agree Faulder's statement occurred in the midst of an argument over contract rights and that Haagenson was arguing that he could not be given less than 40 hours per week employment. On this record and in the context of the series of conversations that occurred however, I do not find Faulder's statement rises to the level of a violation of the Act.

Haagenson's own testimony, quoted supra, demonstrates that Drilling and Faulder had each informed Haagenson that the contract would be followed and that his overtime claim was correct and would be paid. Indeed Faulder had confirmed this to Haagenson but an hour or so before the conversation at issue occurred. Given the overall context of the remark within the particular conversation and within the scheme of Haagenson's overtime advocacy as a whole, I find that Faulder's statement was one of assertion and argument and not a threat cognizable under the Act. Thus, I find that in this context it would not have been reasonable for Haagenson to take the remark as a threat to punitively reduce his hours if he continued to advance his notions of contractual rights. Faulder was in my view asserting a different view of contractual rights and which he illustrated in the manner noted.

Accordingly, I find that the General Counsel has not sustained his burden of proof with respect to complaint paragraph 6(b)(i) and it shall be dismissed.

[11] This sequence makes understandable Terry Miller's question addressed to Faulder as testified to by Haagenson: ''Terry then asked him if I then could stay for 10 hours that day instead of eight hours, as I had been scheduled.'' Haagenson had been scheduled for 12-hour days on Saturday, October 12, and Sunday, October 13, but was out sick on October 14 and 15. Thus Haagenson and Faulder could not have had conversations in the station on those days.

[12] In making these resolutions I credit Drilling that it was he who initially considered and then approved Haagenson's overtime request. This finding explains Faulder's complaint to Haagenson that he had taken his overtime complaint to accounting before taking it to Faulder.

b. *Complaint paragraph 6(b)(ii)*

Haagenson's testimony respecting the telephone conversation with Faulder is set forth in part supra. While on brief Respondent argues Haagenson's version of the call is not worthy of belief, Faulder did not deny the conversation and I found Haagenson's testimony persuasive. I credit it in its entirety.[13]

The General Counsel argues the statements of Faulder were an attempt to ''require an employee to waive, or abandon the right to union representation in order to obtain reinstatement'' (G.C. Br. 19). Respondent argues rather that Faulder was not offering to rehire Haagenson only if he agreed to waive his right to file a grievance or go through the Union for representation, but rather was attempting to ''cause Mr. Haagenson to realize his on-the-job performance was unsatisfactory'' (R. Br. 32).

Relying on Haagenson's credited testimony quoted in part, supra, I find in agreement with the General Counsel, that Faulder was not simply seeking to insure that Haagenson understood that four weeks of working time under proposal B was in substitute for severance pay for the discharge. Rather I find that the fair meaning to be taken from Faulder's statements was that Haagenson and the Union would be required to waive both his contract rights to protection against unjust termination *in perpetuity* as well as be required to waive his rights to secure union representation respecting a future termination. Faulder told Haagenson that he must ''waive [his] rights under the union contract to any [emphasis added] termination after that'' and added that after the four week working period Faulder would be entitled to ''basically terminate [Haagenson] at will.'' These remarks as well as the larger context of the conversation would not be reasonably be taken by an employee seeking reinstatement to be a simply reaffirmation of proposal B, but would quite clearly be taken as an imposition of additional conditions to any reinstatement. Thus I find the waiver demanded by Faulder was far broader than Respondent admits.[14]

It is clear that an employer may not condition an employee's reinstatement on a union's waiver of employees' Section 7 rights. *Teamsters Local 171 v. NLRB*, 863 F.2d 946 (D.C. Cir. 1988), nor may reinstatement be conditioned on an abandonment of a grievance, *Prince Trucking Co.*, 283 NLRB 806 (1987), or the waiver of union representation, *Karsh's Bakery*, 273 NLRB 1131 (1984). Faulder's statements made to Haagenson as quoted in part, supra, in the October 24 telephone call similarly require a waiver of rights from Haagenson and the Union which may not properly be demanded. The actions of Faulder therefore put Haagenson to an improper choice which chilled his Section 7 rights.

Given the above I find that Respondent violated Section 8(a)(1) of the Act when it engaged in the conduct alleged in complaint paragraph 6(b)(ii). Accordingly I sustain this portion of the complaint.

4. The discharge of Haagenson

a. *Arguments of the parties*

The General Counsel asserts that Respondent decided to discharge Haagenson on October 21, 1991, because of his assertions of contract rights. Respondent asserts that Haagenson's contract or overtime claims were not of significance to Respondent and, more importantly, played absolutely no part in the discharge decisions made on October 21. Rather Respondent asserts Haagenson was terminated by Drilling on the recommendation of Faulder based entirely on the two agents' judgment that Haagenson's job performance was inadequate. No party suggests that, if Respondent's decision to terminate Haagenson was based on business factors independent of Haagenson's protected activities, that the October 21 discharge decision was improper.

b. *The causation test*

Discharge cases involving questions of employer motivation of the type presented here are to be analyzed pursuant to the Board's teaching in *Wright Line*, 251 NLRB 1083 (1980). There the Board made it clear that the General Counsel's prima facie case that the employee's protected conduct was a ''motivating factor'' in the employer's discharge decision must first be considered. Should the General Counsel make such a showing, the burden of proof will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. It is appropriate to consider the evidence in the manner suggested.

(1) The General Counsel's prima facie case[15]

Haagenson's credited chronology of events places his primary interactions with Respondent's agents regarding overtime as occurring after the events of October 20 and the Drilling—Faulder conversation in the early morning of October 21. Drilling and Faulder characterize the overtime events as of little consequence generally and of absolutely no import to their decision to terminate Haagenson.

I have determined under my analysis of complaint paragraph 6(b)(i), supra, that Haagenson was correct respecting the timing of the overtime events. I have also generally credited Haagenson over Faulder respecting the specifics of the contract rights conversations between them. Those credibility resolutions apply equally here. I have found therefore that Haagenson engaged in the bulk of his protected activities after the critical events of October 20 and 21. I have also found however that Faulder, even if not violating the Act as alleged in complaint paragraph 6(b)(i), became angry in his discussions with Haagenson on October 21 respecting the rights Haagenson possessed and the obligations Respondent bore under the contract.

[13] Respondent argues that Faulder's statements to Haagsenson constitute an offer of settlement. To the extent this characterization seeks to shelter the statements under Fed.R.Evid. 408 as an offer to compromise, it must fail for statements which would otherwise violate the Act are not privileged or immune from consideration simply because they are part of a settlement discussion.

[14] Given this factual finding I need not address the legal issue of whether or not a narrow waiver would be permissible. I note however that the General Counsel has not alleged that the presentation of proposal B to Haagenson was a violation of the Act.

[15] Respondent argues on brief that Haagenson's contractual claims did not rise to the level of protected activity. I disagree. As the General Counsel notes on brief at 22, the Board in *Interboro Contractors*, 157 NLRB 1295 (1966), found an employee's assertion of rights under a collective-bargaining agreement protected. See also *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

These events without more are hardly a strong case that Respondent discharged Haagenson because of his contract claims. For purpose of continued analysis I here assume without deciding that the evidence supports the inference that Haagenson's protected conduct was a motivating factor in Respondent's discharge decision and that, under *Wright Line*, supra, the General Counsel has established a prima facie, case. It is appropriate therefore to turn to Respondent's defense.

(2) Respondent's defense

Respondent's defense is simply that the asserted protected activity of Haagenson was not a factor in Faulder's October 21 decision to recommend and Drilling's decision to accept the recommendation to terminate Haagenson. In making this argument Respondent offered evidence that Haagenson had long been viewed as less than an ideal employee, that Respondent was looking at replacements for him as a weekend anchor and that his conduct on October 20 was so unsatisfactory so as to require he be immediately given notice.

The parties skillfully litigated the discharge issue in all of its aspects. In my view however, the critical elements of the case are the events of October 20 and the conversation between Drilling and Faulder on the morning of Monday October 21 including the decisions taken at that meeting. Since in Respondent's agents' testimony the decision to terminate Haagenson was taken following Faulder's impassioned complaints about Haagenson's conduct the day before, the credibility of the testimony relating to those events and the conversation is essentially controlling respecting complaint paragraphs 7 and 8.

Turning first to the events of October 20, the testimony of Haagenson and Faulder respecting what was said and done was not at substantial variance. Each describes a conversation in which Faulder became very angry, challenged Haagenson's competence and directed him to contact other news sources. Their versions of the events as well as their versions of their later conversation regarding that day make it clear that Faulder was incensed that Haagenson did not, first on his own initiative and, second, at Faulder's instruction on the day of the fire, contact KPIX, CBS, and CNN to try to obtain ''raw video'' for broadcast that day.

The issue to be decided respecting that day's events is whether Faulder's anger and unhappiness with Haagenson's performance are credible. The issue is not whether Faulder's views were objectively correct, rather the question is whether Faulder, rightly or wrongly, felt as he testified. This is so because it is the subjective motivations of Respondent which are in dispute not the reasonableness of the decisions made.

On this record I find no reason to discredit the testimony of Faulder respecting his reaction to the events of October 20 and his opinion of Haagenson resulting therefrom. There is insufficient objective evidence to support a finding that his testimony was inconsistent with television broadcast news standards generally or with his views and attitudes otherwise expressed during his employment with Respondent. I found his demeanor convincing, particularly when expressing his indignation respecting Haagenson's performance. I find therefore that, rightly or wrongly, Faulder took strong and continuing exception to Haagenson's performance on October 20 and determined, based on that conduct, to seek Haagenson's immediate discharge the following day.

Turning to the discharge conversation the next morning, both Faulder and Drilling, but especially Drilling, appeared to me to be truthful witnesses seeking to describe the conversation on the morning of October 21 as they recalled it. I tend to favor Drilling's testimony respecting these events because he appeared to me to have been less passionately involved in the events and thus better able to have recalled them completely and objectively. Each was a believable witness with a sound demeanor. Their essentially corroborative testimony of this meeting is therefore not to be successfully challenged on demeanor grounds. Nor do I find the decisions taken by Drilling implausible or fatally out of character with his general approach to personnel matters as revealed by his testimony. Simply put, I believed Drilling and Faulder.

Having credited Drilling and Faulder respecting what was said in their meeting on October 21, and putting the burden of proof explicitly on Respondent, I further find that the decision taken at that meeting to present Haagenson with the termination options noted, supra, would have occurred even in the absence of Haagenson's protected conduct.

c. *Summary and conclusion*

I have found that, assuming the General Counsel has established a prima facie case sufficient to support the inference that Haagenson's assertion of contract rights was a ''motivating factor'' in Respondent's October 21 decision to terminate him within the meaning of *Wright Line*, supra, Respondent has met its burden of demonstrating that the October 21 discharge decision would have been made even in the absence of protected conduct.

Accordingly, I find that Respondent's October 21 decision to terminate Haagenson was not in violation of Section 8(a)(3) and (1) of the Act. The General Counsel has therefore not sustain his complaint paragraphs 7, 8, and 10 and they shall be dismissed.

REMEDY

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

An important issue is the appropriate remedy for the violation found under complaint paragraph 6(b)(ii). I have found that Respondent through Faulder violated Section 8(a)(1) of the Act by telling Haagenson – who I have also found was otherwise properly discharged for cause – that his termination would be reconsidered if he ''would agree to waive [his] rights under the union contract to any kind of termination procedure after [reinstatement].''

The Board has long held that employees who are required to abandon union representation, Section 7 rights or contract terms of employment as a condition of continued employment and who forgo their employment rather than accept those unlawful conditions are constructively and unlawfully discharged employees. *Redlands Construction Co.*, 265 NLRB 586 (1982); *Campbell-Harris Electric*, 263 NLRB 1143 (1983), enfd. 719 F.2d 292 (8th Cir. 1983); *Electric Machinery Co.*, 243 NLRB 239 (1979), and cases cited therein.

Haagenson declined Faulder's conditional offer of reinstatement or of continued employment. The Board in *Karsh's*

Bakery, 273 NLRB 1131, Member Hunter dissenting, discussed the degree of certainty necessary to find a constructive discharge in these circumstances at 1132:

> While it is true that the record does not allow a precise determination of the employees' motivation in declining the Respondent's offer of employment, the Respondent created this uncertainty by telling employees it was going to operate ''non-union.'' We will therefore resolve the ambiguity against the Respondent.

The very fact that Haagenson repeatedly asked Faulder if he could obtain reconsideration of the termination only to abandon that effort after being told of Faulder's waiver conditions, strongly suggests Haagenson would have elected ''Proposal B'' if Faulder had not improperly conditioned the offer. Thus an initial examination of the evidence indicates that, but for Faulder's conditions, Haagenson would have remained at work for at least 4 more weeks.

Haagenson's remarks to Drilling and Faulder in electing discharge memorandum proposal A and in so doing immediately terminating his employment, quoted, supra, suggests to some extent that his decision was independent of Faulder's insistence on his waiving the rights noted, supra. Haagenson's testified further however respecting his decision:

> And in talking with Mr. Faulder, I didn't get the impression that I would be retained.
>
> And that under the circumstances of having to waive any rights to appeal a termination following that, I didn't feel it was worth the risk of tying up another four weeks and then being dumped anyway.

This additional testimony, while hardly free from ambiguity, in my judgment makes it sufficiently certain that Haagenson would have continued his employment with Respondent had not Faulder wrongfully conditioned his continued employment by requiring the waivers discussed, supra. Recognizing the ambiguity, and resolving it in favor of Haagenson and against Respondent whose wrongdoing created the uncertainty, I find that Haagenson was constructively discharged or denied reinstatement as a result of the conduct found violative of complaint paragraph 6(b)(ii), supra.

It is also possible that, if Haagenson had elected proposal B and worked 4 additional weeks, Faulder would have demanded his discharge at the end of the period in any event. Indeed Haagenson explicitly thought this might be the case, although Drilling held out hope it would not be so. Again uncertainty must be resolved against the wrongdoer at this stage of the proceeding. On this record, it may not fairly be concluded that Haagenson's employment would have terminated at any given date had Faulder not placed the conditions on his offer of continued employment.

Given all the above, I find that Haagenson was constructively discharged or denied reinstatement on or about October 28, 1991. I shall therefore recommend that Respondent be directed to offer Haagenson full and immediate reinstatement to his former position. Further, Respondent shall be directed to make Haagenson whole for any and all loss of earnings and other rights, benefits and emoluments of employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962).

Because I have found that, had Faulder not improperly conditioned his offer of continued employment to Haagenson, the discharge would not have taken place, it is proper to include a standard expungment remedy even though the initial discharge decision was not for improper reasons. Respondent shall also be required to withdraw, rescind and expunge any and all references to Gene Haagenson's discharge from its files and notify him in writing that this has been done and that the discharge, as opposed to the events underlying the discharge, will not be the basis for any adverse action against him in future. *Sterling Sugars*, 261 NLRB 472 (1982).

Respondent shall also be required to preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports and all other records necessary to analyze the amount of money due under the terms of the Order and to thereafter determine that the Order has been fully complied with.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and on the entire record herein, I make the following conclusions of law.

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

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

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

On or about October 24, 1991, offering to rehire an employee only if he agreed to waive his right to file a grievance or go through the Union for assistance regarding any future termination of his employment.

4. The unfair labor practice described above is an unfair labor practice affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. Respondent did not otherwise violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Retlaw Broadcasting Co., a subsidiary of Retlaw Enterprises Inc., d/b/a KJEO-TV, Channel 47, Fresno, California, its officers, owners, agents, successors, and assigns shall

1. Cease and desist from

(a) Offering employees reinstatement only if they agree to waive their right to file a grievance under the contract and

[16] 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.

waive their right to go through the Union for assistance regarding any future termination of employment.

(b) In any like or related manner violating the provisions of Section 7 of the National Labor Relations Act.

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

(a) Offer immediate employment to employee Gene Haagenson to the position he would have held on October 28, 1991, but for Respondent's wrongful conditioning of his reemployment offer.

(b) Make whole employee Haagenson for any and all losses incurred as a result of Respondent's improperly conditioned reinstatement offer, with interest, as provided in the remedy section of this decision.

(c) Remove from its files any and all reference to the discharge of employee Gene Haagenson and notify him in writing that this has been done and that the occurrence of his discharge, as opposed to the events which underlay the severance memorandum, will not be used against him in future personnel actions.

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

(e) Post at its Fresno, California facility copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 32, 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.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of 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.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

Federal Labor Law as provided in the National Labor Relations Act prevents employers from requiring their employees as a condition of continued employment to waive their rights to the protections of the Act, the terms and conditions of an applicable collective bargaining agreement or the representation and assistance of the labor organization that is their exclusive representative for collective bargaining.

WE WILL NOT require our employees, if they wish to keep their jobs, to waive their right to assert existing contractual protections against termination or to waive their right to go to the Union for assistance regarding any future termination of employment.

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 offer immediate reinstatement to employee Gene Haagenson and WE WILL make him whole for any and all losses of wages, benefits, seniority and any other emoluments of employment he may have lost, as a result of our wrongful reinstatement offer, with interest.

WE WILL rescind, remove all references to the discharge of employee Gene Haagenson and WE WILL notify him in writing that this has been done and that the fact that he was discharged will not a basis for any future personnel actions against him.

RETLAW BROADCASTING CO., A SUBSIDIARY OF RETLAW ENTERPRISES, INC., D/B/A KJEO-TV, CHANNEL 47