Metro Networks, Inc. *and* American Federation of Radio and Television Artists, Philadelphia Local, AFL–CIO. Cases 4–CA–26812 and 4–CA–27207

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On April 8, 1999, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs. The Respondent and the General Counsel filed answering briefs.

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

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

The Respondent provides reports on traffic, news, weather, and business to affiliated radio and television stations in 79 U.S. cities. At the Philadelphia facility[3] at issue, the Respondent employs between 55 and 65 employees, including reporters and producers, in a variety of classifications, most of whom are full-time, salaried employees.

In about late November 1997, the Respondent's employees in Philadelphia received a letter from the Respondent's chairman and CEO, David Saperstein. The letter stated that the Respondent was disappointed that its employees in San Francisco had voted for union representation, that most employees believe that the Respondent is responsive to their ideas and needs, and that the employees should feel free to call him or President Chuck Bortnick if their questions and complaints are not being addressed.

Within a few days, in December 1997, employee and union member Mary Colleen Zoltowski accepted the invitation and spoke with Bortnick by telephone, informing him that the news department employees in Philadelphia had contacted the Union. She complained that part-time employees, including herself, were paid too little; Bortnick responded that she would receive a raise from $12 to $15 an hour. In a later telephone conversation with Bortnick and Mark Shields, the Respondent's Philadelphia branch manager, Shields, told Zoltowski that there would be a new operations manager and "major changes." He asked Zoltowski to keep him informed. Subsequently, in a meeting the same month with Zoltowski, Shields asked her what was going on with the Union and again asked her to keep him informed. The judge found that Bortnick's solicitation of grievances and promise of a wage increase and Shields's promise of improved working conditions, interrogations of Zoltowski, and direction that she report on the union activity of other employees violated Section 8(a)(1). On January 10, 1998,[4] Zoltowski learned that she did not receive the raise that she had discussed with Bortnick. Shields told her that the budget already had been set.[5]

Zoltowski called 55 employees to discuss the Union between January 12 and 16 and, on January 16, called Shields to postpone her scheduled performance review meeting because of a work conflict. During their conversation, Shields asked her what was going on with the Union and whether they had majority support yet. Zoltowski replied that she did not think they had a majority. Shields said she should keep him "informed about what's going on." The judge found that by these comments the Respondent unlawfully interrogated Zoltowski in violation of Section 8(a)(1). On January 17, Zoltowski distributed union literature to about eight employees outside the Respondent's building.

Dennis Brocklehurst began talking to fellow employees about the Union after Thanksgiving and contacted the Union on December 18 or 19, 1997. On the morning of January 19, he openly passed out union literature to 9 or 10 employees at the Respondent's studio while management personnel were present at the facility.[6] That after-

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

[2] We adopt the judge's findings, for the reasons set forth in his decision, that the Respondent violated Sec. 8(a)(1) by soliciting complaints and grievances; promising to improve wages and other conditions of employment; and interrogating and directing an employee to report on the union activity of other employees. We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co*., 335 NLRB 142 (2001). We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] This case involves only the Philadelphia location.

[4] All the following dates are in 1998 unless otherwise noted.

[5] Zoltowski, who was credited by the judge, testified that Shields told her that the budget had been set in October 1997 and, in response to her question, said that the Respondent was doing well financially because of its contract with Bell Atlantic.

[6] The physical layout of the studio facilitates managers' observation of employee activity in the studio. As Brocklehurst testified, he passed out the union materials in the operations area, which consists of an open "pit" surrounded by a chest high counter.

noon, the Respondent discharged Brocklehurst, effective immediately, and gave him a severance agreement for his review and signature.[7] We find below that this conduct violated Section 8(a)(4) and (1) of the Act.

Later the same day, the Union faxed a letter (drafted on January 16) to Shields stating that Brocklehurst, Zoltowski, and two other employees had formed an organizing committee and were requesting voluntary recognition of the Union. As Zoltowski testified, Shields called her the following day, January 20, to tell her that she and Brocklehurst were to be terminated because their jobs had been eliminated due to budget cuts. Shields said that he had received the Union's letter and asked why she was involved. She said she was a strong believer in the Union and had been a member for 15 years. Shields asked who else among the employees was a union member.[8] The judge found that Shields' comments constituted unlawful interrogation. Shields called her again that evening and said he had a termination package for her to sign. Zoltowski replied that she would not sign any termination paper and, apparently as a result, she was not given the proposed severance agreement.

The judge found pretextual the Respondent's assertions that it laid off the employees for budgetary reasons and that it chose Zoltowski and Brocklehurst for the layoff for legitimate business reasons. With respect to Zoltowski, the Respondent offered no reason for her selection other than budget cuts. With respect to Brocklehurst's selection for layoff, News Bureau Chief Paul Perrello, who was involved in the layoff decision, testified at the hearing that 65 percent of the reason Brocklehurst was selected for layoff was his poor performance and 35 percent of the reason was the Respondent's arrangements for the exclusive use of reporters with certain affiliates. In contrast, Shields testified that Perrello did not tell him that Brocklehurst's poor performance was a reason and that he did not consider that an issue. The judge noted that Brocklehurst's last performance evaluation on January 24 was almost perfect. The judge found that Perrello's testimony about Brocklehurst's performance was exaggerated and not believable and that the Respondent's argument concerning the exclusivity arrangement was "disingenuous." The judge also found that the budget savings suggested by the Respondent's witnesses were not supported by the evidence and that the pretextual nature of the Respondent's reasons is further indicated by its failure to offer Brocklehurst or Zoltowski an opportunity to fill any of the vacancies occurring after their terminations.[9] In sum, the judge found that the Respondent unlawfully discharged Brocklehurst and Zoltowski because of their union activity. However, as noted below, the judge found that the Respondent did not violate Section 8(a)(4) with regard to its conduct vis-a-vis severance agreements prepared for Brocklehurst and Zoltowski.

The severance agreement given to Brocklehurst provided that he would receive a payment equivalent to his monthly base salary prorated from the day after his discharge through March 19, 1998. Paragraph 4 of the agreement provided that, in exchange for the payment, Brocklehurst would release the Respondent from all

> suits, actions, causes of action, judgments, damages, expenses, claims or demands, in law or equity, which you ever had, now have, or which may arise in the future regarding any matter arising on or before the date of execution of this Agreement, including but not limited to all claims (whether known or unknown) regarding your employment at or termination of employment from Metro . . . which could arise under . . . the National Labor Relations Act.

The nonassistance provision of the agreement in paragraph 6 provided that

> you agree, not to sue or file a charge . . . in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves Metro . . . and that occurred on or before your execution of this Agreement.

The nondisclosure provision in paragraph 8 provided that

> [y]ou understand and agree that neither you nor anyone acting on your behalf will publish, publicize, disseminate, communicate or cause to be published, publicized, disseminated or communicated to any entity or persons whatsoever, directly or indirectly, information concerning your employment with Metro, the existence of this Agreement or the terms described herein except to your immediate family, attorneys, accountants or tax advisors.

Brocklehurst did not sign the draft severance agreement.

1. The discharges

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by discharging Brocklehurst and Zoltowski for engaging in union activity. In evaluating

[7] Brocklehurst testified that Shields told him that he was being terminated "for budgetary reasons."

[8] Zoltowski testified that Shields also told her during that same conversation that she "was not to go" to the Respondent's two meetings in which the Union would be discussed.

[9] The judge also found that natural attrition would have solved any problem regarding "minor payroll excesses."

8(a)(3) allegations, the Board applies the analysis set forth in *Wright Line*,[10] under which the General Counsel is required to show by a preponderance of the evidence

> (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

FPC Moldings, Inc. v. NLRB, 64 F.3d 935, 942 (4th Cir. 1995) (citations omitted). Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089; and *Naomi Knitting Plant*, 328 NLRB 1279, 1281–1283 (1999) (discussing requirements for meeting burden).

We agree with the judge that the General Counsel has made the showing that Zoltowski and Brocklehurst engaged in protected activity;[11] that the Respondent was aware of the activity, as discussed further below; and that the union activity was a motivating reason for their discharges. Motive and antiunion animus are demonstrated by the Respondent's statements of opposition to the union contained in Saperstein's letter in November 1997 and independently by its violations of Section 8(a)(1), including its unlawful solicitations and promises, interrogations, and direction of Zoltowski to report on the union activity of other employees. We also agree with the judge that the Respondent has failed to rebut the General Counsel's showing.

With respect to knowledge, as the judge found, the Respondent had direct knowledge of Zoltowski's union activity based on conversations with management that included the unlawful statements previously recounted. We further infer that it also gained knowledge of Brocklehurst's union activity because of its contemporaneous 8(a)(1) violations; its general awareness of union activity; and because Brocklehurst and Zoltowski were the only employees who openly espoused support for the Union prior to the discharges and Brocklehurst circulated flyers in the operations area of the studio, which facilitated easy observation by the Respondent's managers. We also infer knowledge from the timing of the discharges (on the same day that Brocklehurst circulated union material and on the heels of Zoltowski's organizing activity and expressions of union sympathy) and from the pretextual nature of the reasons advanced by the Respondent for the discharges, i.e., budgetary considerations, Brocklehurst's poor performance, and exclusivity arrangements. See *Medtech Security, Inc*., 329 NLRB 926, 929–930 (1999) (circumstantial evidence, including timing, general knowledge of union activity and pretext, supported finding of employer knowledge), citing *Darbar Indian Restaurant*, 288 NLRB 545 (1988) (finding of knowledge based on employer's general knowledge of union activity, the timing of the discharge, the 8(a)(1) violations found, and pretext given); and *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996) (Board may infer knowledge from circumstantial evidence including timing, general knowledge of union activity, animus, and disparate treatment). See also *American Chain Link Fence Co.*, 255 NLRB 692, 693 (1981), enfd. in relevant part *NLRB v. American Spring Bed Mfg. Co.,* 670 F.2d 1236, 1245 (1st Cir. 1982) (termination of only two open union supporters and opportunity of management to observe employees engaged in union activity among factors relied on to find knowledge).

2. The releases

The judge concluded that the Respondent did not violate Section 8(a)(4) and (1) by offering the dischargees, Brocklehurst and Zoltowski, severance pay in consideration for signing the releases. He found that it is "a stretch that any reasonable person reading them would conclude that the signatory would be prohibited from cooperating with the Board in its investigation or litigation of unfair labor practice charges." The judge noted that, although the language of the release is "comprehensive," the Board is mentioned only in one paragraph that contains language the Board has found acceptable.[12] Regarding paragraphs 6 and 8 of the agreement, the nonassistance and nondisclosure clauses quoted above, the judge found these provisions not sufficiently specific to preclude cooperation with the Board.[13]

In their exceptions, the General Counsel and Charging Party argue that the Respondent violated Section 8(a)(4)

[10] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 989 (1982), overruled in part on other grounds, *Director, Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994).

[11] The Respondent does not contest this fact.

[12] *First National Supermarkets*, 302 NLRB 727 (1991) (release of claims arising out of individual's "total employment" lawful because, in circumstances of case, provision understood as referring to matters such as the individual's claim for vacation pay arising out of his past employment and relating to the settled discharge).

[13] In this regard, the judge contrasts *EEOC v. Astro USA*, 94 F.3d 738 (1st Cir. 1996), in which the court found that releases specifically prohibiting employees from filing charges with the EEOC or assisting in its investigations were void as against public policy.

and (1) by conditioning severance payments on the nonassistance and nondisclosure provisions of the agreement. We find merit to these exceptions. Contrary to the judge, we agree that the Respondent has violated Section 8(a)(4) and (1) with regard to paragraphs 6 and 8 of the severance agreement it offered and gave to Brocklehurst.[14]

Section 8(a)(4) provides that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The Board's approach to this provision "has been a liberal one in order to fully effectuate the section's remedial purpose." *General Services*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972). Such an approach is consistent with the Court's acknowledgement that the initiation of a Board proceeding effectuates public policy and, therefore, through Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).

As the Court noted in *Scrivener*, 405 U.S. at 122, "[t]his complete freedom is necessary . . . to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses" (quoting *John Hancock Mutual Life Insurance v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)). Moreover, the Court observed, it is consistent with the fact that "the Board does not initiate its own proceedings; implementation is dependent 'upon the initiative of individual persons.'" 405 U.S. at 122 (quoting *Nash v. Florida Industrial Commission*, 389 U.S. at 238). Section 8(a)(4), an essential aspect of the statutory scheme, is designed to "safeguard the integrity of the Board's processes." *Filmation Associates*, 227 NLRB 1721 (1977) (it provides a "fundamental guarantee" to those invoking the procedures of the Act; and the duty to preserve Board's process from abuse is a function of the Board and may not be delegated to the parties or an arbitrator).

Mindful of these principles and practical concerns, the Board and courts have found that Section 8(a)(4) is not limited to protecting an employee who has filed charges and testified on his or her own behalf. For example, the Court in *Scrivener* rejected an appeal for a narrow interpretation of Section 8(a)(4) and found that it extends to the protection of employees who provide information through affidavits gathered during investigations or appear at Board hearings pursuant to subpoenas without testifying. 389 U.S. at 123–125.[15] It also protects an employee who provides information to the Board that assists another employee. E.g., *National Surface Cleaning, Inc. v. NLRB*, 54 F.3d 35 (1st Cir. 1995) (Board properly found that the employer unlawfully discharged four employees for supporting a coworker's filing of charges). See also *NLRB v. Retail Wholesale Union Local 876*, 570 F.2d 586, 590–591 (1978), cert. denied 439 U.S. 819 (employer may not retaliate against employee for refusing to testify on the employer's behalf in Board proceedings).[16]

Likewise, an employer may not coercively condition an individual's return to employment on withdrawal of charges and forbearance from future charges and concerted activity because "future rights of employees as well as the rights of the public may not be traded away in this manner." *Mandel Security Bureau, Inc.,* 202 NLRB 117, 119 (1973). Indeed, in *Clark & Hinojosa*, 247 NLRB 710 fn. 1 (1980), the Board found that the employer violated Section 8(a)(4) when it refused to provide severance pay it had previously promised to a former employee after she threatened to complain to the Board about her discharge, even though the Board did not address the question of whether the discharge was unlawful.[17]

[14] We find that the Respondent did not unlawfully offer Zoltowski the severance agreement because it neither showed her the severance agreement nor told her about the nonassistance and nondisclosure provisions in pars. 6 and 8.

[15] In this regard, the Court stated that it would

> make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time.

405 U.S. at 124.

[16] Nor does Sec. 8(a)(4) prohibit discrimination only after the filing of a charge or because an employee has appeared at a hearing. For example, it prohibits an employer from discriminating against an employee for announcing an intention to file a charge with the Board. *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 (6th Cir. 1987), citing *First National Bank & Trust Co*., 209 NLRB 95 (1974), enfd. 505 F.2d 729 (3d Cir. 1974) (employer prohibited from discriminating against employee based on belief that individual had or would file a charge). The court noted that it had previously followed a more restrictive, literal interpretation of Sec. 8(a)(4), but declined to do so in this case based on the Supreme Court's intervening pronouncements in *Scrivener*, supra. *Grand Rapids Die Casting Corp.,* 831 F.2d at 116 fn. 2.

[17] The Board may approve non-Board settlement agreements where appropriate. The Board determines "in its own discretion, 'whether under the circumstances of the case, it will effectuate the purposes and policies of the Act to give effect to any waiver or settlement of charges of unfair labor practices.'" *Independent Stave Co*., 287 NLRB 740, 741 (1987) (quoting *National Biscuit Co*., 83 NLRB 79, 80 (1949)). Despite its commitment to settlements, the Board "will refuse to be bound by any settlement that is at odds with the Act or the Board's policies." Id. See also *Beverly California Corp. v. NLRB*, 253 F.3d 291 (7th Cir. 2001) (upholding Board's refusal to honor settlement agreement, which

Contrary to the judge, and consistent with precedent, we find that the plain language of the severance agreement would prohibit Brocklehurst from cooperating with the Board in important aspects of the investigation and litigation of unfair labor practices charges. Paragraph 6 would forbid Brocklehurst from assisting with regard to any claim filed by another individual except as "required by law," and paragraph 8 would prohibit him from communicating with anyone about his employment with the Respondent. The terms of these provisions are comprehensive and include voluntarily giving information to the Board or participating in any claim filed by any individual.[18] Moreover, even assuming that the language of section 4 in the agreement releasing the Respondent from any suits brought by the signatory itself may not violate Section 8(a)(4) of the Act, it does not in any way limit or negate the prohibitive nature of the nonassistance and nodisclosure provisions of paragraphs 6 and 8.[19]

We further find, contrary to the judge, that the narrow exception in paragraph 6 allowing participation "required by law" does not render the agreement lawful. As noted above, it is well established that "[t]he Board's ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully to obtain relevant information and supporting statements from individuals." *Certain-Teed Products*, 147 NLRB 1517, 1519–1520 (1964) (employer's statements that employees need not voluntarily cooperate with Board investigation violated Sec. 8(a)(1)). As recognized by the Supreme Court in *Scrivener*, 405 U.S. at 122, such investigations often rely heavily on the voluntary assistance of individuals in providing information. An individual's refusal voluntarily to provide information in an investigation may result in an otherwise meritorious charge being dismissed and, therefore, no subpoena to testify would be forthcoming. In this case, the Respondent's use of the nonassistance and nondisclosure provisions could have prevented Brocklehurst, a former employee it unlawfully discharged for union activity, from providing information to the Board concerning its unlawful interference with the statutory rights of all the employees. Such conduct unlawfully chills the Section 7 rights of all the employees. In short, we find unlawful the Respondent's offer of a severance agreement prohibiting Brocklehurst from assisting other employees with regard to any matter arising under the National Labor Relations Act and/or disclosing any information to the Board with regard to any and all investigations and proceedings.[20]

ORDER

The National Labor Relations Board orders that the Respondent, Metro Networks, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting complaints and grievances and promising improved wages and working conditions.

(b) Interrogating employees concerning the union activities of other employees.

(c) Directing employees to report the union activities of other employees.

(d) Discharging or otherwise discriminating against employees because they engage in union or other concerted activity protected by the National Labor Relations Act.

(e) Offering former employees a severance agreement prohibiting assisting other employees with regard to any

covered NLRB charges in its settling of civil rights claims, considering the General Counsel's opposition and its lack of reasonableness).

[18] We find no merit in the Respondent's assertion that par. 8 relates only to the confidentiality of the agreement because that paragraph also prohibits, in disjunctive language, his communication of information concerning his employment to any entity or person.

[19] Cf. *First National Supermarkets*, supra, fn. 9 (release restricted to matters arising out of an employee's past employment and discharge lawful).

[20] We find no merit in the Respondent's assertion that its proffer of the severance agreement was lawful because Brocklehurst did not sign it. The Respondent's proffer of the severance agreement, with pars. 6 and 8, constitutes an attempt to deter Brocklehurst from assisting the Board in the process. Brocklehurst's conduct in *not* signing the agreement does not render the Respondent's conduct lawful.

We also find no merit in the Respondent's assertion, in essence, that its offer was lawful because Brocklehurst was not entitled to any severance pay. The offer is unlawful because the Respondent sought to prevent him from communicating and providing information to the Board. See *Clark & Hinojosa*, supra, 247 NLRB at 718–719 (although employer not required to offer severance pay, it may not withhold severance pay discriminatorily). In contrast to the remedy in *Clark & Hinojosa*, however, we do not order the Respondent to offer Brocklehurst the settlement agreement without the unlawful provisions because we find that his discharge was unlawful. In *Clark & Hinojosa*, supra at 723, the Board did not find the underlying discharge unlawful and therefore such a remedy was appropriate.

Chairman Hurtgen concurs in the finding of a violation, but does so on limited grounds. If the proposed severance agreement had simply precluded Brocklehurst from filing or assisting in regard to his own claims, it may well have been lawful. However, the proposed agreement precluded him from assisting or otherwise participating in any proceeding of any kind "which relates to any matter that involved Metro." Thus, for example, Brocklehurst would be forbidden from assisting other employees in any charge that they might file against Metro. To this extent, it was unlawful.

Chairman Hurtgen recognizes that there is an exception for assistance which is "required by law." But, this does not obviate the point that Brocklehurst would not be able to exercise his Sec. 7 right to voluntarily assist others. In sum, in the Chairman's view, severance pay was conditioned upon the waiver of Brocklehurst's right to assist other employees. Since the waiver was not confined to claims that Brocklehurst might have, Chairman Hurtgen concurs in the violation.

matter arising under the National Labor Relations Act and/or disclosing any information to the National Labor Relations Board with regard to any investigation or proceeding.

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

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

(a) Within 14 days from the date of the is Order, offer Dennis Brocklehurst and Mary Colleen Zoltowski immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Dennis Brocklehurst and Mary Colleen Zoltowski whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, rescind the severance agreement offered to Dennis Brocklehurst and notify him in writing that this has been done.

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

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 4, 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 pendency of these proceedings, the Respondent has gone out of business or closed its 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 the date of this Order.

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

[21] 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.

WE WILL NOT solicit complaints and grievances from our employees and promise to improve wages and other conditions of employment.

WE WILL NOT interrogate our employees concerning the union activity of other employees.

WE WILL NOT direct our employees to report on the union activity of other employees.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union or other concerted activity protected by the Act.

WE WILL NOT offer former employees a severance agreement prohibiting assisting other employees with regard to any matter arising under the National Labor Relations Act and/or disclosing any information to the National Labor Relations Board with regard to any investigation or proceeding.

WE WILL NOT in any other manner interfere with, restrain, or coerce our 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 Dennis Brocklehurst and Mary Colleen Zoltowski

immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Brockelhurst and Mary Coleen Zoltowski whole for any wages or other benefits that they may have suffered as a result of our discrimination against them, with interest.

WE WILL, within 14 days from the date of this Order, rescind the severance agreement offered to Dennis Brockelhurst and notify him in writing that this has been done.

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

METRO NETWORKS, INC.

Peter C. Verrochi, Esq., for the General Counsel.

Douglas S. Zucker, Esq., of Morristown, New Jersey, for the Respondent.

Jonathan K. Walters and *Mary Locke, Esqs*., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Philadelphia, Pennsylvania, on January 12, 13, and 29, 1999, upon the General Counsel's consolidated complaints1 which alleged that the Respondent discharged two employees in violation of Section 8(a)(3) of the National Labor Relations Act. It is also alleged that the Respondent violated Section 8(a)(1) and (4) of the Act.

The Respondent generally denied that it committed any violations of the Act, and contends the discharges were based on economic necessity and were not caused by any union activity.

On the record as a whole,2 including my observation of the witnesses, briefs and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order

I. JURISDICTION

The Respondent is a Delaware corporation with facilities throughout the United States engaged in the business of providing traffic, news, and weather reports to radio and television stations. At its Philadelphia facility, the Respondent annually derives gross revenues in excess of $100,000 and annually purchases and receives goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

American Federation of Radio and Television Artists, Philadelphia Local, AFL–CIO (Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

[1] At the hearing, counsel for the General Counsel's motion to consolidate was granted.

[2] Counsel for the General Counsel's motion to correct transcript is granted, and is included in GC Exh. 1. A list of terminations at the Respondent's Philadelphia branch between December 1997 and December 1998 submitted after the hearing is received in evidence as GC Exh. 38.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent operates in 79 cities throughout the United States, providing to affiliate radio and television stations traffic, news, weather, business, and informational reports. At the Philadelphia facility the Respondent has 55 to 65 employees in such classifications as: anchor, producer, airborne reporter, airborne anchor, producer, mobile reporter, and reporter. Most are full-time, salaried employees, however, there are a few who work on a part-time, hourly basis. Dennis Brocklehurst (sometimes in the record Randy Brock, his on-the-air name) was a full-time reporter, who worked about 10 weeks a year as a news anchor. Mary Zoltowski (Zoltowski) was a part-time producer, who also did fill-in work.

Organizational activity among employees of the Respondent began rather casually in December 1997, following their receipt of a letter dated November 24 from David Saperstein, the Respondent's chairman and CEO, to the effect that employees at San Francisco had voted for a union and the company was "disappointed." Thus Brocklehurst testified that he contacted the Union on December 18 or 19, and between Thanksgiving and his termination, he talked to 8 or 10 employees about the Union. And, on the morning of January 19, before reporting for work, he passed out union literature to 9 or 10 employees at the Respondent's studio.

Mary Zoltowski was a longtime member of the Union. She testified that on receiving the letter, she accepted the invitation to call Saperstein. Charles Bortnick, the Respondent's president, called her back and they discussed certain problems at Philadelphia. She told him that employees were considering going to the Union, and in fact the news department employees had contacted the Union. During this conversation, according to Zoltowski's credible testimony, among the problems she raised was the pay for part-time employees such as herself. She was being paid $12 per hour. Bortnick told her that in January she would be raised to $15.

Mark Shields, the branch manager at Philadelphia, and Bortnick called her back later and again they discussed the Philadelphia situation, which Shields saying that they were going to get a new operations manager and there would be major changes. Shields asked Zoltowski to keep him informed.

Subsequently in December she met with Shields. He asked her what was going on with the Union. And he asked her to keep him informed. On January 10, she did not get the promised raise and Shields told her that the budget had been set. Between January 12 and 16 she called 55 employees and on January 17 distributed union literature to about 8 employees.

On Friday January 16, Brocklehurst, Zoltowski, and two other employees met with union representatives. A letter was drafted to Shields stating that the four had formed an employee organizing committee and requesting voluntary recognition. The letter was sent by fax shortly after Brocklehurst was discharged on Monday, January 19. Zoltowski was notified of her discharge on January 20.

Each was to receive severance pay on the signing of a five-page comprehensive release which contained the following provisions:

> 4. In consideration of the payments described in Section 2 and for other good and valuable consideration you . . . hereby release and forever discharge, Metro . . . from all . . . suits, actions, causes of action, judgments, damages, expenses, claims or demands, in law or in equity, which you ever had, now have, or which may arise in the future regarding any matter arising on or before the date of execution of this Agreement, including but not limited to all claims (whether known or unknown) regarding your employment at or termination of employment from Metro . . . which could arise under . . . the National Labor Relations Act.
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> . . . .
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> 6. [Y]ou agree not to sue . . . in any forum or assist or otherwise participate, except as may be required by law, in any claim.

. . . .

> 8. You understand and agree that neither you nor anyone acting on your behalf will publish . . . communicate . . . to any entity. . . information concerning your employment with Metro, the existence of this Agreement or the terms described herein except to your immediate family, attorneys, accountants or tax advisors.

B. Analysis and Concluding Findings

1. The alleged 8(a)(1) activity

It is alleged that Shields committed violations of Section 8(a)(1) in November, December, and on two dates in January. Specifically, it is alleged that in late November, Shields and Bortnick solicited complaints and grievances from an employee and promised increased wages and improved terms and conditions of employment in order to discourage employees from selecting the Union as their bargaining representative. I credit Zoltowski's testimony over the denials of Shields and Bortnick. I conclude that the interrogation along with solicitation of grievances and the promise of a wage increase and "major changes" was necessarily coercive and violative of Section 8(a)(1) of the Act. E.g., *Hertz Corp.,* 316 NLRB 672 (1995).

Similarly, in paragraph 5(b) it is alleged that at the end of December, Shields interrogated an employee about the union activity of other employees and directed that employee to report such activity. In support of this allegation is again the testimony of Zoltowski.

Zoltowski testified that in a conversation initiated by Shields, he spoke of a union coming in at the last place he worked, and "made me feel that he believed that the Union was okay by the conversation. And then he asked what was going on with the Union in Philadelphia." She told him that the producers were talking to her about the Union and she stated that she had been a member for 15 years. After some discussion, "he said let me know what's going on with the Union, keep me informed."

Shields denied that he had any conversation with Zoltowski in December "in regard to the Union," or that he interrogated any employee about the Union or asked any employee to report union activity.

Although Shields was reasonably credible in general, on this specific matter he was not. Zoltowski, on the other hand, was credible concerning her account of the November and December conversations. I therefore find and conclude that Shields did interrogate an employee about the union activity of others and directed that she keep him informed about other employees' union activity. In these respects, the Respondent violated Section 8(a)(1) of the Act. *Tony Silva Painting Co.,* 322 NLRB 989 (1997).

On January 16, Zoltowski called Shields to tell him that because of a work assignment in New York, she would not be available for a performance review to be held on January 23 and she would like to have it rescheduled. He told her that would not be a problem and they would set it for a later date. Then, according to her testimony, "he asked me what was going on with the Union, if we had a majority of people for the Union yet. I said no, I didn't think we had a majority." And he said, "[W]ell keep me informed about what's going on."

Shields testified that Zoltowski called him on January 16 to say that she wanted her annual review to be rescheduled because "she was going to be in New York, I think. And I said fine, just let me know when you want to come in." He denied asking her anything about the Union or employees' support for the Union.

Again, as to the material elements of this conversation, I credit Zoltowski and discredit Shields. I therefore conclude that as alleged in paragraph 5(c), the Respondent coercively interrogated an employee about employees union activity in violation of Section 8(a)(1).

Shields contacted Zoltowski by phone on January 20 to tell her that she and Brocklehurst were be terminated—that their jobs had been eliminated due to budget cuts. He told her he had received the Union's letter and asked why she was involved. She told him that she was "a strong believer in the Union," and had been a member for 15 years. Shields asked who else among employees was a member.

The testimony of Shields about this phone call was limited to his telling Zoltowski that she was being laid off. He neither confirmed nor denied that he asked about her involvement with the organizing campaign or asked her who else among employees was a member.

Zoltowski's testimony was credible and consistent, I conclude that the call of January 20 occurred generally as she testified and that the Respondent violated Section 8(a)(1) as alleged in paragraph 5(d).

2. The terminations

On Monday, January 19, Brocklehurst was notified of his termination. On January 20, Zoltowski was notified of hers. The General Counsel alleges that these terminations were the result of employees' union activity, and were meant to discourage such. Therefore the Respondent violated Section 8(a)(3) of the Act. The Respondent contends that the embryonic organizing campaign was not a factor—that economics was the sole reason Brocklehurst and Zoltowski were terminated. I find it much more plausible that the terminations resulted from union activity than solely from budget considerations. I conclude that the General Counsel established a prima facie showing that the terminations were violative of the Act and that the Respondent did not meet its burden that they would have been terminated irrespective of any union activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

These terminations occurred just as the organizing campaign was becoming active. Thus, when Zoltowski called Shields on Friday, January 16, to request her evaluation be rescheduled, and he agreed (indicating no intent to terminate her at that time), he asked how the union campaign was progressing and whether they had a majority. She told him she did not believe there was a majority yet for the Union, but that more employees were going to the union office.

I discredit Shields' testimony that he determined to terminate Zoltowski on January 16. Such a decision is inconsistent with his agreement to reschedule her evaluation. Rather, I conclude that on talking with her, he became aware of increased union activity, which carried on through Monday, January 19. Thus Zoltowski passed out literature on Saturday and Brocklehurst did the same Monday morning.

Although animus in this case is not overwhelming, the letter of November 24 to all employees nationwide demonstrates that the Respondent is steadfastly opposed to unions organizing its employees. Beyond this is Shields unlawful interrogation of Zoltowski on several occasions, the promises of benefits, and on January 20, two meetings of Philadelphia employees attended by three high-level management officials who spoke against the Union. This conclusion is based on the credible testimony of Deborah Byrne, who was not included in the bargaining unit and who has no apparent stake in the outcome of this matter.

Finally, the Respondent's contention that it was motivated only by economic considerations is not supported by credible evidence. Indeed, I believe the economic defense was developed in order to hide the Respondent's true motive, from which I can, and do, infer that the Respondent was motivated by the employees' union activity. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966).

Of the approximately 52 rank-and-file employees, three were designated full-time, salaried reporters—Brocklehurst, Ralph Fox, and Thomas MacDonald. Brocklehurst was hired on April 1, 1996; Fox on April 16, 1997, and MacDonald May 16, 1996. Of those in the classification which the Respondent contends it determined to downsize, Brocklehurst was the senior person. In selecting which employee to be laid off for economic reasons, employers are not required to pick by seniority. However, it is so common to do so, and so accepted as the fair way to choose those selected for economic layoff, all other factors being equal, where an employer fails to follow seniority that fact is some evidence that the asserted motive is false.

The Respondent argues that Brocklehurst was selected because two affiliate stations requested that Fox and MacDonald be exclusive to them. Where a reporter is exclusive to an affiliate, that individual cannot give on the air reports broadcast by other stations. The Respondent's argument that exclusiveness required it to keep Fox and MacDonald, I conclude, is disingenuous. Exclusiveness for Fox and MacDonald limited their use, and rather than being a reason to lay off Brocklehurst, was a reason to keep him. The Respondent did not attempt to explain why this was not so.

The Respondent also offered, through the testimony of News Bureau Chief Paul Perrello, that 65 percent of the reason Brocklehurst was selected for layoff was his poor performance and the exclusivity agreements 35 percent. (Shields, however, testified that Perrello did not give this as a reason for recommending Brocklehurst be terminated rather than one of the others and that "This wasn't a performance issue in my mind.") The evidence that Brocklehurst was a

poor performer is vague and highly suspect, given that his most recent performance review dated January 24, 1997, was almost perfect. Employees are given one of three ratings ("needs improvement," "good," "very good") in 10 categories. Brocklehurst had nine "very good" and one "good." Though I accept, as Perrello testified, that Brocklehurst failed once to respond to a page, it is clear that Perrello's testimony about Brocklehurst's performance was exaggerated and not believable.

I have no trouble believing that the Respondent continually sought ways to reduce expenses. However, I do not believe that terminating the two most active employees in the organizing drive was motivated by budget considerations. For instance, the Respondent hired one full-time and seven part-time employees between September 1997 and May 1998. In December and January, 11 employees voluntarily quit. Of the 39 employees terminated between December 1997 and December 1998, only Brocklehurst and Zoltowski and one other were involuntary. The Respondent's records show that there is a regular and substantial turnover of the employee complement, which indicates that laying off employees is not something which would be mandated by the budget, even if the Respondent sought to reduce expenses. Natural attrition would solve these relatively minor payroll excesses, if in fact such excesses existed.

Further, the savings suggested by the Respondent's witnesses were not supported by the evidence. Thus Shields testified that by laying off Zoltowski, the Respondent saved $10,000 per year. She was an hourly employee regularly scheduled 1 day a week at an approximate annual salary of $5200. Any additional earnings were as a fill-in, work which presumably would have be done by someone else if Zoltowski was not available. Since she was offered a severance of $2600, the actual savings to the Respondent for the year by eliminating her job was $2600, not $10,000.

Brocklehurst and Zoltowski were experienced and, according to their most recent evaluations, capable and valued employees. Yet neither was offered the opportunity to fill one of the many vacancies which occurred after their terminations. For this reason, if no other, the budget motive must be found a pretext.

The Respondent argues that it had no knowledge of Brocklehurst's union activity until after his termination; therefore, union activity could not have played a role. I discount this argument. Even Shields admits that he knew of union activity in general prior to terminating Brocklehurst. On the morning of January 19, the day he was terminated, Brocklehurst distributed union literature at the Respondent's facility at a time when management personnel were present. While there is no direct evidence that this was observed by management, given the small number of employees it is reasonable to infer that Brocklehurst's activity was known. *Hospital San Pablo, Inc.,* 327 NLRB 300 (1998). I further discount Shield's testimony that the termination decision was made on January 16. Zoltowski called him that day to reschedule her annual performance review. Rather than telling her of his alleged determination to terminate her, he agreed to reschedule it.

I conclude that Shields decided to terminate Brocklehurst and Zoltowski on January 19 after learning that the union activity was increasing. I conclude that the Respondent violated Section 8(a)(3) by terminating Brocklehurst and Zoltowski.

3. The release

On terminating Brocklehurst and Zoltowski, the Respondent offered each severance pay in consideration for signing a comprehensive release which contained the above-quoted language. Though severance pay (and a release) were not given to involuntarily terminated employees as a matter of course, such was not unusual. The releases signed by others from facilities throughout the United States contain substantially identical language.

The General Counsel argues that by requiring acceptance of this language as a condition for receiving severance, the Respondent violated Section 8(a)(4). The General Counsel does not argue that a release waiving an employee's right to file a charge based on events predating the release is unlawful. Rather, it is argued, this case "presents a novel issue, i.e., whether Respondent may lawfully condition severance payments on the execution of broad non-assistance and non-disclosures clauses." The General Counsel cites *EEOC v. Astro USA,* 94 F.3d 738 (1st Cir. 1996), wherein it was held that settlement agreements prohibiting employees from filing charges with the EEOC or assisting the EEOC in its investigation of any charges were void as against public policy.

In *Astro,* the releases specifically bound the settling employee not to file or assist anyone who files any kind of action arising out of the employment including any suit under the Civil Rights Act of 1991 or Title VII of the Civil Rights Act of 1964.

By contrast, the releases here were not so specific, though they were indeed comprehensive. Nevertheless, I believe it a stretch that any reasonable person reading them would conclude that the signatory would be prohibited from cooperating with the Board in its investigation or litigation of unfair labor practice charges. The only mention of the NLRB, is in paragraph 4, a release of the type found acceptable by the Board. *First National Supermarkets,* 302 NLRB 727 (1991). The so-called nondisclosure and nonassistance clauses do not mention cooperating with enforcement actions of the national labor laws by the Board, which the clauses in *Astro* did. I therefore conclude that a violation of Section 8(a)(4) under these facts has not been proven and I shall recommend that the allegations in Case 4–CA–27207 be dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including offering Dennis Brocklehurst and Mary Colleen Zoltowski reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim 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).

[Recommended Order omitted from publication.]