

**KNTV, Inc. and American Federation of Television
and Radio Artists, AFL-CIO. Case 32-CA-
12732**

October 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS
BROWNING, COHEN, AND TRUESDALE

On July 7, 1993, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act when its president, Park, told employee Ken Wayne, "I hope you won't continue to be an agitator or instigate others." The judge found that Park's statement was unlawfully coercive because it was made in response to Wayne's protected concerted attempts to have the Respondent discuss wages and other working conditions with an employee committee.

The Respondent excepts, arguing that it did not violate Section 8(a)(1). It contends, initially, that Park's testimony should be credited instead of Wayne's. Alternatively, the Respondent argues that Wayne's testimony differs from that recited by the judge. Finally, the Respondent asserts that, even crediting Wayne, Park's statement was neither coercive nor threatening.

We agree with the Respondent that the judge misquoted the record. Wayne testified that Park told him, "[W]ell I hope you won't continue to be an agitator or antagonize the people in the newsroom." Even correcting this testimony, however, we adopt the judge's finding that the Respondent violated Section 8(a)(1). Thus, this statement was made to Wayne by Park, the Respondent's highest ranking official. It was made during a meeting, in Park's office, that Wayne was required to attend alone despite his request that the Respondent meet with the employee committee. Further, Park's statement was directed at Wayne's protected attempts to have the Respondent address employee pay

¹The 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.

issues. In these circumstances, Park's comments had a chilling effect and interfered with Wayne's exercise of rights guaranteed by Section 7 of the Act. *Maine Apple Growers*, 254 NLRB 501, 502 (1981).

2. The judge found, and we agree, that the General Counsel failed to establish a prima facie case that union activities were a motivating factor in the Respondent's discharge of Wayne. Accordingly, we adopt the judge's finding that Wayne's discharge did not violate Section 8(a)(3).

3. The judge additionally concluded that Wayne's termination did not violate Section 8(a)(1). In this regard, the judge found that the evidence failed to establish that Wayne, a staff reporter, was engaged in protected concerted activity on August 26, 1992, when he conditioned working as a substitute anchor on the Respondent's looking into the question of whether to pay substitute anchors additional wages. Instead, the judge concluded that: (1) Wayne and a fellow reporter did not act in concert or discuss group action when discussing extra pay for substitute anchoring; (2) Wayne did not indicate that he was acting on behalf of anyone but himself when discussing the anchor-pay issue with the Respondent; and (3) the Respondent never indicated that it thought Wayne was acting concertedly. The judge further found that the Respondent did not condone Wayne's August 26 conduct; instead, it discharged him for the insubordinate act of conditioning anchoring on favorable action on the anchor-pay issue.

The General Counsel excepts arguing, among other things, that Wayne was engaged in concerted activity when he asked the Respondent to look into the anchor-pay issue raised by employee Robin Fladeboe and that the Respondent knew of this concert. The General Counsel additionally contends that Wayne did not condition anchoring the news on the Respondent's favorable action on the pay issue. Even assuming that Wayne imposed this condition, the General Counsel argues that this was akin to a one-time refusal to work mandatory overtime, which is protected. *Sawyer of Napa*, 300 NLRB 131 (1990). See generally *Mike Yurosek & Son*, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).

The General Counsel further asserts that the Respondent condoned Wayne's conduct by not discharging him until August 28. The General Counsel also contends that the Respondent seized on the events of August 26 to discharge Wayne, whom it perceived as an "agitator," and that these events were merely used as a pretext to mask the Respondent's unlawful motive.

For the following reasons, we find merit to the General Counsel's exceptions and conclude that Wayne's discharge violated Section 8(a)(1).

A. Facts

The Respondent operates a television station in San Jose, California. Beginning in July 1991, Ken Wayne freelanced as a news reporter for the Respondent. In November 1991, the Respondent hired Wayne as a full-time staff reporter.² Thereafter, in addition to reporting, Wayne worked as a backup news anchor approximately two dozen times, when regular anchors were not able to work as scheduled. Wayne anchored when requested to do so by the Respondent, and he neither sought nor received additional compensation for this work.

By all accounts, Wayne was a superior reporter. In the summer of 1992,³ Wayne asked News Director McElhatton for a raise, offering to do extra work to justify it. McElhatton responded favorably, and said he would check with the Respondent's president, Park. Subsequently, McElhatton told Wayne that Park would not consider the raise request until Wayne's next review period, which was in November 1992.⁴

1. Events in July—early August

In July, Wayne and other newsroom employees exchanged complaints about wages and other working conditions. Following these discussions, Wayne posted a handwritten notice on the bulletin board announcing a meeting of nonmanagement newsroom employees to discuss their concerns. On July 22, Wayne conducted an employee meeting in the Respondent's conference room; about 18 of the approximately 30 newsroom employees attended. At the meeting, employees discussed their work concerns and possible options—including union representation. The employees decided initially that they would write to Park.

Wayne and two other employees drafted a letter to Park stating in essence that it was the consensus of the employees that they were underpaid when compared to the Respondent's profits and the high cost of living in the area, and asking that the Respondent meet with employees to discuss "fair and equitable pay and compensation." After employees approved the letter, Wayne placed copies in their work mailboxes on July 23, and in the boxes of Park, McElhatton, and Robert Munoz, the managing editor of the newsroom. Later the same day, McElhatton told Wayne it was "an interesting letter," even though the letter did not name Wayne or any other employee.

On July 24, McElhatton told Wayne that Park wanted to meet with him individually. When Wayne said that he did not want to meet separately, but rather as

part of an employee group, McElhatton responded that Park did not want to meet with the employees as a group, but would meet individually with employees.

Following McElhatton's request, Wayne conducted a second employee meeting on July 27. At this meeting, employees designated a three-person committee—which included Wayne—to represent them in wage discussions with Park.⁵ After the July 27 meeting, the committee wrote to Park, identifying themselves by name, and asking Park to meet with the committee to discuss wages and other concerns and to respond to the July 23 letter.

On July 28, McElhatton notified Wayne that Park wanted to meet with him about the letter. When Wayne said that he preferred that Park meet with the committee, McElhatton stated that Wayne had no choice; Park wanted to see him individually.

Wayne met with Park and McElhatton. In this meeting, Park explained the Respondent's wage structure and compared Wayne's wages to the area average. Wayne said that he did not want to meet individually, but wanted Park to meet with the committee. When Park elicited Wayne's feedback, Wayne said he felt uncomfortable discussing compensation in the absence of the committee. Park expressed disappointment that Wayne would not discuss the pay issue, and concluded the meeting by stating, "[W]ell I hope you won't continue to be an agitator or antagonize the people in the newsroom."

After meeting with Park, Wayne telephoned the Union and arranged for an employee meeting on August 5. Wayne distributed a notice of the meeting to all employees. Approximately six to eight employees attended this meeting, which was held off the Respondent's premises. Following the meeting, Wayne distributed union literature in employee mailboxes.

2. Events in late August

a. Background

According to Wayne's uncontradicted testimony, when he was hired in the summer of 1991 as a freelance reporter, there was no job description for the position of reporter. When he was subsequently hired as full-time reporter in November 1991, he told McElhatton that he was interested in becoming a weekend anchor. McElhatton told him that he would have the opportunity to anchor. Wayne thereafter continually expressed to McElhatton his interest in becoming an anchor, volunteering to fill any openings on the anchor schedule.

Wayne eventually filled in as a substitute (or "backup") anchor when one of the regular anchors

²On his full-time hire, Wayne was required to sign a document acknowledging that he was an "at-will employee" subject to discharge, with or without cause.

³All subsequent dates are in 1992 unless noted.

⁴McElhatton did not testify and the judge inferred that his testimony would have been adverse to the Respondent.

⁵Wayne was the reporter representative on the committee. The other two committee members represented the photographers, editors, producers, and writers.

was sick or on vacation, about two dozen times between October 1991 and his termination in late August 1992. Wayne and McElhatton had not discussed whether Wayne would receive extra pay for doing backup anchoring, and Wayne did not receive any such pay. Also, while Wayne had never been told that he would not be *required* to serve as a backup anchor, he in any event never (prior to August 26) expressed any reluctance to anchor when he was asked to do so. Indeed, he testified that whenever he was asked to be a backup anchor, he “always jump[ed] at the chance.”

According to Wayne, on each occasion that he was asked to substitute as a backup anchor, he had also been out in the field reporting earlier in the day, “so that by the end of the day when all that [reporting] work is done, then you begin your new [anchoring] task.” Wayne testified further that “I had always . . . reported during the day and then anchored the news in addition to that.”

In this regard, Wayne’s supervisor, Managing Editor Munoz, testified that all of the approximately five full-time reporters have filled in as backup anchors. When Munoz would approach reporters to be backup anchors that night, they generally asked Munoz whether they would be relieved of their reporting duties for the rest of the day, and Munoz would do so in order to enable them to substitute that night as backup anchors.

b. Events

On August 25, less than 3 weeks after the union meeting, reporter Robin Fladeboe initiated a wage discussion with Wayne. Fladeboe told Wayne that he had performed a lot of backup anchoring work, and felt he should receive extra pay for the extra work.⁶ Fladeboe said that when he had raised the issue, Managing Editor Roberto Munoz had not taken it seriously. Wayne expressed interest, telling Fladeboe that he was curious how the issue came out because it was a very reasonable concern.

At the Respondent’s request, Fladeboe co-anchored on August 25. On August 26, the Respondent needed two substitute anchors for the evening news. That morning, after filling one of the spots, Munoz chose Wayne for the second because his workload that day was lighter than that of other reporters. Specifically, Wayne was going to work that day on a “hold-for-release” (HFR) story, i.e., one which is prepared and taped for showing at a later date, and thus one for which the reporter involved is not required to write his accompanying story immediately on his return to the station, for a showing that same night. According to Munoz, because Wayne’s story was HFR, not to be shown that day, he would have a lighter workload than the other reporters. The other reporters would not be

⁶Fladeboe previously had been a weekend anchor for the Respondent.

returning to the station that day until about 3 or 4 p.m., and they would not have time to get their stories on the air and also prepare to anchor the news that evening. While Wayne would also be returning to the station around 3 p.m., he would have no writing responsibilities for that evening’s newscast. In Munoz’s opinion, therefore, Wayne was the reporter most available to fill in as backup anchor that day.

When Munoz asked Wayne if he could anchor that night, Wayne replied that he could, but that he wanted to know what happened with the pay issue Fladeboe had raised the previous day. Munoz said that nothing had come of it and asked Wayne if he wanted to anchor. Wayne responded that he thought Fladeboe’s issue was a legitimate one that needed to be looked into. When Munoz asked Wayne if he was going to anchor that night, Wayne replied, “Yes, I’ll anchor the news as soon as we get some kind of reaction to what happened with Rob’s issue.” Munoz answered that he was not asking Wayne to anchor—he was telling him to—and asked whether Wayne was refusing to anchor. Wayne replied, “[N]o, I’m not refusing to work. I will gladly anchor the news tonight. But I think this pay issue needs to be looked into.” Wayne and Munoz went back and forth several times in this vein with Wayne trying to convince Munoz that he was not refusing to work, and Munoz trying to convince Wayne that he was. Wayne repeatedly told Munoz that he would gladly anchor the news “if they could get this thing looked into.” Ultimately, Munoz instructed Wayne to prepare for that day’s assignment. As Wayne made preparations, Munoz stated that McElhatton had said that if Wayne was refusing to work, he could be suspended. Wayne shrugged his shoulders and went on assignment.⁷ Munoz subsequently arranged for Fladeboe to anchor that evening.

When Wayne returned from his assignment, mid-afternoon, McElhatton called him into his office. Munoz also was present. McElhatton told Wayne that Park felt the pay issue was legitimate and would be looked into. McElhatton further stated that the Respondent could not continue to rely on its reporters to fill in as anchors, as it could not force reporters to anchor.⁸ Wayne responded:

[T]hat sounds great. I’m glad you guys are willing to look into this. And as a good faith measure I’ll be glad to anchor the news tonight until you get this situation resolved, until we get an answer on

⁷Wayne testified that he left without commenting, because he was exasperated that Munoz persisted in asking whether he was refusing to anchor, when he was not.

According to Munoz, whom the judge discredited, Wayne repeatedly refused to anchor unless he was paid extra.

⁸The judge interpreted McElhatton’s statement to mean that the Respondent could not physically force reporters to substitute, and not, as argued by the General Counsel, that the assignment was purely voluntary.

what you guys are going to do about this[,] without any extra pay. I'd be glad to anchor the news that night and the rest of the remaining week or however long it took to get the situation resolved.⁹

Wayne did not anchor on August 26. Instead, Fladeboe anchored, as requested earlier that day.

On August 27, Munoz told Park that Wayne had refused to work three or four times the day before unless the Respondent paid him extra money. Park then telephoned Stewart Beck, president of Granite Broadcasting, which owned the Respondent's stock. Park told Beck that Wayne previously had anchored without objection, but now was refusing this work, and was attempting to renegotiate his contract. When Beck asked Park what action he thought appropriate, Park responded "discharge." Park drafted a termination notice and faxed it to Beck.

Subsequently, Beck conducted a conference call with Park, McElhatton, and Munoz. In this discussion, Beck questioned Munoz about the facts. When Munoz repeated the account he gave Park, Beck authorized Park to send the termination letter.

On August 28, McElhatton gave Wayne a termination letter stating that his refusal to substitute as anchor on August 26 without an immediate agreement for additional compensation was inappropriate and contrary to the interests of the news department. Wayne told Park there had been a misunderstanding, and asked for another chance. Park said he was sorry, but that there would be no other chance.

About August 30, Wayne telephoned Beck and asked him to reconsider the discharge. Wayne insisted that he had not refused to anchor the news but simply said that he would gladly anchor if the Respondent looked into the pay issue. Beck interpreted Wayne's statement as a confirmation of Munoz' account, and told Wayne he believed Park had decided correctly.

B. Analysis

1. Wayne's conduct was "Concerted"

An employee's activity will be deemed concerted, when it is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Pacific Electriccord Co. v. NLRB*, 361 F.2d 310, 310 (9th Cir. 1966), enfg. 153 NLRB 521 (1965). Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action. *Root-Carlin, Inc.*,

⁹Munoz testified that in this afternoon meeting, McElhatton said that the pay issue would be discussed further and that Park had an open door policy. Munoz said that Wayne stated, among other things, that he was willing to anchor the rest of that week.

92 NLRB 1313, 1314 (1951); *Atlanta Newspapers*, 264 NLRB 878, 879 (1982).

We find that Wayne was engaged in concerted activity on August 26 when he sought the Respondent's agreement to look into the anchor-pay issue raised by Fladeboe, another employee. We conclude that Wayne's August 26 conduct was a continuation of his concerted activities the preceding month in seeking to improve employee pay, and was a logical outgrowth of his discussion of the substitute anchor pay issue with Fladeboe the day before.

Thus, only a few weeks earlier, Wayne had been the catalyst for employee discussions over pay and compensation by scheduling and leading employee meetings and drafting letters to management conveying group complaints of inadequate compensation. Wayne further spearheaded the compensation issue by serving as a designated employee spokesperson to management and by repeatedly requesting, without success, that the Respondent meet with the committee to discuss employee concerns.¹⁰ Not only did the Respondent consistently refuse Wayne's repeated requests that the Respondent meet with Wayne's committee to discuss these concerns, but it unlawfully threatened Wayne with retaliation if he continued to engage in his concerted activities. Against this background, we view Wayne's August 26 request that the Respondent consider Fladeboe's request for additional pay for substitute anchors as but a continuation of his open and active engagement in, and leadership of, concerted activities involving employee pay issues. See *JMC Transport*, 272 NLRB 545, 545 fn. 2 (1984); *Dayton Typographical Service v. NLRB*, 778 F.2d 1188, 1191 (6th Cir. 1985), enfg. in relevant part 273 NLRB 1205 (1984).¹¹

We further find that Wayne was acting in concert with Fladeboe when Wayne pursued the substitute anchor-pay issue with Munoz. Thus, Fladeboe raised the anchoring pay issue with Wayne, an acknowledged spokesperson on employee pay issues. Wayne expressed his interest in the issue and asked Fladeboe to let him know how it turned out.¹² Thereafter, when

¹⁰Wayne additionally orchestrated a meeting between newsroom employees and the Union to discuss possible representation.

¹¹As she stated in *Liberty Natural Products*, 314 NLRB 630 fn. 4 (1994), Member Browning questions the validity of the ultimate holding in *Meyers I & II (Meyers Industries)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffid. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). She notes, however, that the conduct here would be found concerted even under the standard of those cases. 268 NLRB at 497; 281 NLRB at 882.

¹²Although Fladeboe and Wayne did not explicitly agree to work together on the substitute anchor-pay issue, we agree with the General Counsel that they tacitly agreed that this was a legitimate issue that should be pursued with management. See generally *Salisbury Hotel*, 283 NLRB 685, 687 (1987).

Munoz asked Wayne to anchor the following day, Wayne openly joined in concert with his coworker, Fladeboe, by asking Munoz what had happened to Fladeboe's anchor-pay issue. We find that Wayne's inquiry to Munoz on the morning of August 26 was a logical outgrowth of his discussion of the substitute anchor-pay issue with Fladeboe the day before. When Munoz responded that nothing had occurred, the issue clearly demonstrated to the Respondent that the issue was one of mutual concern to these two employees, stating that he would gladly anchor if the Respondent looked into Fladeboe's issue.

2. The Respondent knew that Wayne's August 26 conduct was concerted

We find that the Respondent knew that Wayne was engaged in concerted activity on August 26. Prior to August 26, the Respondent consistently treated Wayne as the employee leader on the issue of increased pay. For example, when the employees presented the Respondent with the July 23 letter requesting increased compensation, News Director McElhatton made a point of telling Wayne that the letter was interesting, even though the letter named no specific employees. The following day, the Respondent further identified Wayne with the employee pay issue when McElhatton told Wayne that Park wanted to discuss the issue with him. And, after the July 27 letter naming Wayne as an employee spokesperson, and Wayne's repeated requests that Park meet with the employee committee on the pay issue, Park singled out Wayne's leadership role on the wage issue, stating to him, "[W]ell I hope you won't continue to be an agitator or antagonize the people in the newsroom."

Against this background, we find that the Respondent knew that Wayne was continuing to spearhead the employees' concerted activities when pursuing the anchor-pay issue with management on August 26. Indeed, the comments of Wayne and McElhatton make clear that Wayne was not acting solely on his own behalf, and that the Respondent knew he was not.¹³ For example, when Wayne raised the anchor-pay issue with Munoz, he expressly referred to it as the subject "raised by Fladeboe," and volunteered to anchor "as soon as we get some kind of reaction to . . . [Fladeboe's] issue." (Emphasis added.) Thereafter, McElhatton told Wayne that Park considered the "pay issue" to be a legitimate one, and that the Respondent could not continue to rely on its "reporters" to fill in for anchors. Wayne's response to McElhatton, that he

¹³ We reject the judge's finding that before Wayne, no employee had requested additional pay for anchoring. Fladeboe made precisely that request on August 25. Even if Munoz did not treat Fladeboe's request seriously, there was no room for him to doubt on August 26 that Wayne had embraced Fladeboe's request and was pursuing the compensation "issue."

would gladly anchor until "we get an answer on what you guys are doing," is further evidence that the Respondent knew that Wayne was acting on behalf of other employees. (Emphasis added.) *Alpha Resins Corp.*, 307 NLRB 1219 fn. 3 (1992).

3. Wayne's August 26 conduct was protected

Next, we find that when requesting that the Respondent look into the anchor-pay issue, Wayne was engaged in protected activity. See generally *J. J. Cook Construction Co.*, 203 NLRB 41, 46 (1973). Contrary to the Respondent's argument, we do not find that Wayne refused to anchor the news on August 26 unless he received extra pay. Indeed, Wayne never refused to anchor at all. Wayne instead repeatedly agreed on the morning of August 26 to substitute as an anchor that evening if the Respondent would agree to look into the substitute anchor-pay issue. When, later in the day, McElhatton told Wayne that the Respondent thought that the substitute anchor-pay issue was a legitimate one that needed to be looked into, Wayne in turn told McElhatton that he was glad that the Respondent had agreed to look into the issue, and he once again volunteered to anchor without additional pay, for the rest of the week, until the Respondent could get the issue resolved. But the Respondent refused Wayne's offer. Having done so, the Respondent cannot now reasonably claim that Wayne refused to anchor.

In coming to this result, we note again, as shown in section 3.A.2.b above, that Wayne repeatedly denied Munoz' accusations that Wayne was refusing to work as a substitute anchor. We also note that even after flatly accusing Wayne several times of refusing to work, Munoz finally told Wayne only that "if" he was refusing to work, he could be suspended. Wayne noncommittally shrugged his shoulders, Munoz certainly did not suspend him, and Wayne thereupon went out on his regular assignment. No matter what our dissenting colleague attempts to make of this, it is not, in our view, a refusal to work as a substitute anchor.

Nor does the fact that the Respondent scheduled Fladeboe to work as the substitute anchor on the day in question establish that Wayne had refused to do that work. At most, the assignment of Fladeboe in place of Wayne arguably tends to show that the Respondent may have believed—or may have chosen to believe—that Wayne might renege on his promise to substitute anchor if the Respondent agreed to look into the pay issue—even though the Respondent had, by that time, in fact agreed to look into the pay issue. In any event, whether the Respondent genuinely perceived that Wayne might renege on his promise to substitute anchor, in return for the Respondent's agreement to look into the pay issue, or whether instead such a claim was merely contrived, the Respondent's scheduling of

Fladeboe to fill in for Wayne under these circumstances does not—indeed, cannot—constitute proof of the asserted fact that Wayne was refusing to work as a substitute anchor.

Even assuming, *arguendo*, that Wayne's August 26 conduct could be viewed as a refusal to perform work, we nonetheless would find such a refusal akin to a single concerted refusal to work voluntary or mandatory overtime, either of which refusals is protected by the Act. *Sawyer of Napa*, *supra*, 300 NLRB at 137.

Wayne's conduct was not a "partial strike." Rather, substitute anchoring, like voluntary or mandatory overtime, was distinct from Wayne's regular reporting duties, and was performed during a distinct block of time—5 to 5:30 p.m., 6 to 6:30 p.m., and 11 to 11:30 p.m.

Additionally, we find it significant that the Respondent never told Wayne on his hire, or during his employment, that substitute anchoring was a required element of his job, or that he could not refuse anchoring requests. That Wayne had previously agreed to requests to substitute as news anchor is a reflection of his interests and career goals, not his obligations to the Respondent.

4. The General Counsel established a *prima facie* case which was un rebutted

Based on the foregoing, we find that the General Counsel established a *prima facie* case that Wayne was unlawfully discharged. Thus, the evidence shows that: (1) Wayne had been in July, and continued to be in August, engaged in protected concerted activity in attempting to get the Respondent first to look into pay issues in general and then to look into substitute anchor pay in particular; (2) the Respondent knew that Wayne, in engaging in the above conduct, was at all times engaged in protected concerted activity; (3) Wayne was discharged soon after his July activities, and only 2 days after his August 26 activity; and (4) the Respondent had very recently, in July, demonstrated unlawful animus against the exercise of protected concerted activity on the part of its employees in general, and Wayne in particular, by threatening Wayne with retaliation for engaging in protected concerted activity, in violation of Section 8(a)(1) of the Act.

We further find that the Respondent failed to show that it would have discharged Wayne even in the absence of his protected concerted activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Respondent's asserted reason for discharging Wayne—insubordination for refusing to work as an anchor unless he got paid extra for doing so—was pretextual. In fact, Wayne never refused to work as an anchor. And even if the Respondent arguably believed that Wayne was refusing on the morning of August 26

to work as an anchor that evening, the arguable refusal was not conditioned on his getting extra pay for anchoring that night, but rather on the Respondent simply agreeing to look into the substitute anchor-pay issue. The facts are that by the afternoon of August 26, still hours before Wayne would have been due to anchor, (1) *the Respondent had agreed* to look into the anchor-pay issue, and (2) *Wayne in turn had agreed* to anchor without additional pay that night and for the rest of the week, until the issue could be resolved. Thus, the ultimate reason that Wayne did not anchor on August 26 was not, as proffered by the Respondent, because he refused to, but because the Respondent would not let him. Because this proffered reason is false, we infer that the Respondent's actual motive was an unlawful one which it sought to conceal. *Cell Agricultural Mfg. Co.*, 311 NLRB 1228 fn. 3 (1993); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).¹⁴ Moreover, as we have found, that would not be a lawful reason for discharge were it the true reason.

Accordingly, under all of these circumstances, we find that the Respondent violated Section 8(a)(1) by discharging Wayne.

Our dissenting colleague asserts (1) that the work of substitute anchoring was an integral aspect of Wayne's employment as a full-time reporter and (2) that his alleged refusal to substitute as anchor on August 26 therefore constituted a partial strike, unprotected by the Act. We disagree.

The dissent relies on *Audubon Health Care Center*, 268 NLRB 135, 136 (1983), in support of these contentions. This reliance is misplaced. In *Audubon*, the Board preliminarily defined a partial strike as one "in which employees refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises." Applying that standard to the facts before it, the Board found that certain nurses aides were lawfully discharged for engaging in a partial strike. Specifically, and contrary to their established past practice, the aides suddenly refused in the middle of their work shift to continue to "work short" by filling in for and performing patient-care duties for the assigned patients of an unexpectedly absent fellow nurses aide—while continuing, however, to perform their *own* normal patient-care duties for their own assigned patients during their normal work shift.

In finding that the aides were engaged in a partial strike, the Board found under the circumstances that covering temporarily unstaffed patient care areas was not extra work for the aides but was instead part of their regular duties. Thus, the Board found:

¹⁴To the extent that the Respondent argues that Park and Beck believed, based on Munoz' reports, that Wayne refused to work without immediate, additional compensation, their mistaken belief provides no defense. *Jhirmack Enterprises*, 283 NLRB 609, 610 (1987).

Whether this coverage [of sections left open by the absence of other aides] first developed through the aides acting of their own volition . . . or through assignment . . . it is clear that it became *a practice so routine that no formal assignment was needed: both the aides and their supervisors assumed that the former would cover the open section.* [268 NLRB at 136; emphasis added.]

No such finding is possible in the instant case. As seen, substitute anchoring is not “a practice so routine that no formal assignment [is] needed.” Indeed, substitute anchoring is not a part of the normal duties of a reporter for the Respondent, and when the Respondent needs a reporter to be a substitute anchor, a specific request for such a reporter must be made in each instance. Thus, quite unlike in *Audubon*, neither the reporters nor the Respondent simply “assum[e] that the former [will] cover the open [anchor] slot.”

Finally, and dispositively, the Board in *Audubon* found

the duties and responsibilities involved in covering the open section were *the same as those entailed in the aides’ normal assignments. Only the amount of the work that they were required to perform increased . . .* [Id; emphasis added.]

But in the instant case, quite unlike in *Audubon*, the duties and responsibilities of substitute anchoring were fundamentally different in kind from those entailed in the reporters’ normal assignments. Not only did the amount of work increase, into the evening, but more importantly for purposes of our analysis of whether Wayne was engaged in a partial strike, the *kind* of work fundamentally changed, from reporting to anchoring.

In sum, unlike in *Audubon*, where the aides performed the additional duties during the same period as, and in conjunction with, their other assignments, substitute anchoring involves substantially different work from reporting, and is normally performed during different period of time. Thus, we find *Audubon* to be inapposite.¹⁵

¹⁵ We also find our colleagues’ reliance on *Vic Koenig Chevrolet*, 263 NLRB 646 (1982), and *Polytech, Inc.*, 195 NLRB 695, 696 (1972), to be misplaced. *Vic Koenig* is a partial strike case, very similar in principle to *Audubon*, in which the Board found that a nonstriking, nonunit employee was lawfully discharged for refusing, during a strike to perform not only some struck work but also some of his normal, nonunit work. The Board found that the employee had taken an extremely restrictive view of his job, eliminating much of what he was normally paid for, and that in taking this position he had unwittingly given up the protection of the Act by in effect declaring his intention to engage in a partial strike, thereby accepting his pay for performing only part of his job, while avoiding the disadvantages of complete strike action. We find this partial strike situation in *Vic Koenig*, like the similar situation in *Audubon*, to be inapposite to the instant circumstances.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make Ken Wayne whole for any loss of earnings and other benefits he suffered as a result of his unlawful termination. *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, KNTV, Inc., San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with retaliation for engaging in protected concerted activities.

(b) Discharging employees because they engaged in protected concerted activities.

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

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

(a) Offer Ken Wayne immediate and full reinstatement to his former job or, if that job not longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole Ken Wayne for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the amended remedy section of this decision.

(c) Remove from its files any reference to the unlawful discharge and notify Ken Wayne, in writing, that this has been done and that the discharge will not be used against him in any way.

(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 offices, and at all facilities in San Jose, California, copies of the attached notice marked “Appendix.”¹⁶ Copies of the notice in Spanish and

In *Polytech*, the employer violated the Act by suspending employees for engaging in an isolated concerted refusal to work overtime on their normal jobs. See *Sawyer of Napa*, supra, 300 NLRB at 137, citing, inter alia, *Polytech*. Assuming that Wayne’s conduct was a refusal to perform work, it was likewise a protected concerted refusal to work overtime.

¹⁶ 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

Continued

English, 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.

CHAIRMAN GOULD, concurring.

I find that it is unnecessary to determine whether Wayne's actions on August 26, 1992, constituted an unprotected refusal to work because, assuming *arguendo* that they were unprotected, the Respondent condoned his actions and its reliance on these actions to discharge Wayne was therefore pretextual.

The law is clear that condonation of activity is not to be readily inferred but rather must be based on clear, convincing, and positive evidence that the employer has agreed to forgive the employee's misconduct and desires to continue the employer-employee relationship as though no misconduct had occurred. *Fibreboard Corp.*, 283 NLRB 1093, 1098 (1987); *Marquette Cement Mfg. Co.*, 219 NLRB 549, 553 (1975). In *United Postal Service*, 301 NLRB 1142 (1991), the Board found that it need not reach the issue of whether an employee's concerted activity in refusing to drive his route because of unsafe road conditions was unprotected. Rather, the Board found that even assuming the employee's activity was unprotected, the Respondent had condoned his failure to complete his deliveries. The Board noted that "[t]he doctrine [of condonation] prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven."¹ The Board found there that the essential elements of condonation were met. The employee's supervisor had given him permission to return to the center early. When he returned to the center and expressed his reluctance to make further deliveries, his supervisor told him he could punch out and go home sick. The Board concluded that the supervisor acquiesced in the employee's failure to complete his work by giving him permission to return to the center and leave work early without completing his route. Under these circumstances, the Board found that the employer had condoned the employee's actions, and, once condoned, the employer could not use any unlawful or un-

protected aspect of that activity as a basis for discipline.²

Here, the credited testimony reveals clear, convincing, and positive evidence that the Respondent forgave Wayne's alleged misconduct and acted as if it desired to continue its employment of him as though no misconduct had occurred. After the exchange on August 26 between Wayne and Munoz concerning whether Wayne was refusing to work, Munoz told Wayne that McElhatton said that if Wayne was so refusing, he could be suspended. Several hours later, when Wayne returned from his assignment, he was called into McElhatton's office, where he met with McElhatton and Munoz. Rather than being suspended, Wayne was told by McElhatton that he had talked to Park about the pay issue, and Park and McElhatton agreed that it was a legitimate issue that needed to be looked into. Wayne replied that this sounded great, he was glad they were willing to look into the issue, and as a good-faith measure he would be glad to anchor the news that night or for the rest of the week without extra pay until the issue was resolved.

Wayne also told McElhatton that he was surprised that suspension had been discussed. McElhatton replied that Munoz stated Wayne had been refusing to work. Wayne told McElhatton that there had been a problem in dialogue, and McElhatton said, "[W]ell, whatever, we're now going to figure out how we can come to terms with this." They all then shook hands, and Wayne stated that he wished they could solve all their problems this way. Wayne then left McElhatton's office and saw Fladeboe in the newsroom. He flashed Fladeboe a "thumbs up" sign, went over to him, and said that it looked like they were going to look into the pay issue. Wayne continued working for the next 2 days. On August 28, however, after he had finished his assignments for the day, he was called into McElhatton's office and given his letter of termination. The letter stated he was being terminated for refusing to be a substitute anchor without immediate agreement for additional compensation. He appealed to Park, but was told he would not be given a second chance.

In these circumstances, I find that the essential elements of condonation are present. Wayne indicated he would work if the pay issue was looked into. Munoz interpreted this as a refusal to work. Yet, despite this interpretation, other than telling Wayne that he could be suspended, the Respondent did not indicate to Wayne on August 26 that there would be any further repercussions from his actions. Rather, the Respondent told Wayne that it agreed with him that the pay issue

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."

¹ Id. at 1143, citing *Packers Hide Assn. v. NLRB*, 360 F.2d 59, 62 (8th Cir. 1966).

² Id. at 1144, citing *General Electric Co. (Hotpoint)*, 292 NLRB 843 (1989); *Davis & Burton Contractors*, 261 NLRB 728 (1982); *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 102 (7th Cir. 1971); *Richardson Paint Co. v. NLRB*, 574 F.2d 1195, 1202-1203 (5th Cir. 1978).

was a legitimate one and that it would look into it. Wayne was not required to anchor the news that night and was permitted to continue his work for the next 2 days. On August 28, when Wayne was discharged, his alleged refusal to work no longer existed. The Respondent had met the condition he presented, and, by so doing, had condoned his action. Accordingly, the Respondent cannot later rely on that activity as a basis for discipline.

MEMBER COHEN, dissenting in part.

I agree with the majority that the Respondent violated Section 8(a)(1) by threatening employee Wayne with retaliation in order to discourage employees' protected concerted activities. I further agree that the General Counsel failed to establish a prima facie case that Wayne's discharge violated Section 8(a)(3). Contrary to my colleagues, however, I agree with the judge that Wayne's discharge did not violate Section 8(a)(1). Assuming arguendo that Wayne was engaged in concerted activity on August 26, 1992, or that the Respondent reasonably understood that his actions were concerted, I find that his refusal to perform anchor functions, unless certain demands were met, constitutes an unprotected partial strike for which he lawfully was discharged.

It is well settled that a partial refusal to work is unprotected conduct. *Highlands Medical Center*, 278 NLRB 1097 (1986). "Both the Board and the courts have repeatedly condemned employees' refusal to work on the terms lawfully prescribed by the employer while remaining on their jobs." *Id.* The Board views such a partial refusal as an attempt by employees to set their own terms and conditions of employment, in defiance of their employer's authority over these matters. *Audubon Health Care Center*, 268 NLRB 135, 136 (1983); *Vic Koenig Chevrolet*, 263 NLRB 646 (1982); *Polytech, Inc.*, 195 NLRB 695, 696 (1972).

Here, substitute anchoring was an integral aspect of reporters' employment. In this regard, the record establishes that the Respondent assigned its reporters backup anchoring when regular anchors were unavailable for this work. Indeed, all five full-time reporters had been assigned backup anchoring work. Managing Editor Munoz testified, without contradiction, that when reporters were assigned anchoring work, they customarily sought, and the Respondent granted, a reduction in their reporting assignment. Consistent with this practice, the Respondent selected Wayne for anchoring on August 26 precisely because his regular workload was lighter than that of the other reporters.

Further, Wayne understood that anchoring was part of his job. Although Wayne was initially hired as a freelance reporter in July 1991, he applied the following November for both full-time reporter and weekend anchor positions. When Wayne interviewed with News Director McElhatton for both positions, Wayne said

that he was experienced in anchoring and was interested in becoming a weekend anchor. Although Wayne was hired for the reporter position, he conceded that, when given this job, he knew that he would be expected to perform backup anchoring work. Consistent with this understanding, Wayne substituted as anchor throughout his employment with the Respondent. Indeed, Wayne anchored approximately 24 times during his final 10 or 11 months' employment with the Respondent.

In sum, the past practice is such that the Respondent reasonably came to rely on Wayne's performance of the anchor function in those instances where a substitute anchor was required. Accordingly, even though the anchoring function was not technically a part of Wayne's job description, it was nonetheless a de facto element of his job.¹ *Audubon Health Care Center*, supra.²

It follows from the above that Wayne was refusing to perform a part of his job. Under *Highlands Medical Center*, supra, that conduct was unprotected.

¹ When Wayne sought a pay raise in the summer of 1992, he offered to perform *additional* work in order to justify the increase. Significantly, Wayne did not mention anchoring as the additional work. He understood that anchoring was part of his regular work. Accordingly, the additional work that he suggested was the work of special news programming. This further supports my finding that anchoring was a part of Wayne's job.

² Contrary to my colleagues, I do not find *Audubon* distinguishable. In *Audubon*, the Board found that employees engaged in an unprotected partial strike by refusing to perform duties which, as a result of either their voluntary acts or the employer's assignment, had become part of their jobs. Likewise, here, substitute anchoring had become part of the reporters' duties. Thus, the record establishes that all reporters had performed substitute anchoring work. Wayne, in particular—who knew when hired that he would be expected to anchor—substituted as anchor on a regular basis throughout his employment. Further, in all instances where reporters performed substitute anchoring, they did so without receiving additional or separate compensation. There is no evidence that any reporter had ever refused an anchoring assignment.

My colleagues would also distinguish *Audubon* on the basis that the work that employees refused to perform in that case was interspersed throughout the employees' regular workday. Here, the majority contends, substitute anchoring was performed during discrete periods of time. I disagree. As discussed infra in fn. 3, the record does not establish what hours reporters customarily worked or if, indeed, there were customary hours. Moreover, the record does establish that when reporters were assigned anchoring work they routinely requested that their regular reporting duties be curtailed. The Respondent granted these requests. Indeed, on August 26, Wayne was selected to substitute anchor precisely because his lighter reporting load would permit him to return to the station about 3 p.m. to prepare for anchoring rather than to work on news stories for that evening's telecasts.

Finally, my colleagues' attempt to distinguish *Audubon* on the ground that the work employees refused to perform in that case was the same type as their customary work and not, as here, different from their reporting duties. I reject this argument. In my view, the relevant inquiry is not whether refused work is the same as other assigned duties, but whether the refused work has become, either explicitly or implicitly, part of the employees' jobs. I find that substitute anchoring clearly had become part of Wayne's job.

My colleagues argue that Wayne's conduct was comparable to a refusal to perform overtime duties. I disagree. If employees perform work during regular hours, and then perform that work during additional hours, and if they are paid for each separate period, they may well be protected if they refuse to perform during the latter period. See *Sawyer of Napa*, 300 NLRB 131, 137 (1990). Where, as here, however, employees are assigned multiple tasks for a given period of time and they are paid a sum for all such tasks, the employees have no statutory right to pick and choose which tasks they will perform.³

In the instant case, Wayne chose not to perform a part of his job unless a condition was met. It makes no difference whether that condition was "looking into" the pay issue or resolving the pay issue in Wayne's favor. In either event, Wayne placed a condition on the performance of his work. Since this refusal to perform was unprotected, the Respondent was privileged to discharge him therefor.

My colleagues find that Wayne did not refuse to substitute anchor when he was assigned this work on August 26. I disagree. Repeatedly in his discussion with Managing Editor Munoz on the morning of August 26, Wayne conditioned anchoring on the Respondent's acceding to his demand to consider the pay issue. For example, when Munoz flatly asked Wayne if he was going to anchor that night, Wayne replied that he would do so "as soon as we get some kind of reaction to what happened with [the pay] issue." Even after Munoz informed Wayne that he was being told, not asked, to anchor, and that he could be suspended for refusing this assignment, Wayne persisted in insisting on this condition. In my view, Wayne's conduct clearly constituted a refusal to perform assigned work unless his conditions were met.

I also reject my colleagues' conclusion that Wayne could not have been discharged for refusing to anchor because, later on August 26, after News Director McElhatton said the pay issue would be looked into, Wayne offered to anchor. Thus, on the morning of August 26, when Wayne was assigned to anchor, he clearly refused unless his impermissible condition was met. Faced with that refusal, which it viewed as insubordination, the Respondent made necessary alternative arrangements to provide for adequate news coverage, again selecting Fladeboe to substitute anchor. When Wayne returned to the station about 3 p.m. on August 26, he learned that Fladeboe had been assigned the an-

³ Contrary to my colleagues' claim, the General Counsel had not established that anchoring was performed during a discrete period of time. There is no evidence as to the regular hours worked by reporters, nor any claim by Wayne or others that anchoring required them to work longer hours. Indeed, Munoz' testimony that Wayne was selected to anchor on August 26 because his reporting duties were lighter than those of other reporters intimates just the opposite—that his anchoring would have occurred during his regular workday.

choring work, and observed Fladeboe making preparations for the newscast. Only later, when McElhatton told Wayne that the Respondent would look into the pay issue, did Wayne offer to anchor without extra pay until the issue was resolved. In these circumstances, I cannot agree with my colleagues that "the Respondent cannot now reasonably claim that Wayne refused to anchor."

Accordingly, I would affirm the judge in this regard.⁴

⁴ Contrary to the concurring opinion, I find no "clear, convincing, and positive evidence that the Respondent forgave Wayne's alleged misconduct." Rather, the evidence establishes that Wayne refused to perform part of his job unless the Respondent looked into the pay issue. The Respondent objected to this condition, telling Wayne that he could be suspended for his conduct. Nonetheless, Wayne persisted in his demand. Respondent ultimately knuckled under to Wayne's demand and agreed to look into the pay issue. The Respondent, however, never excused Wayne's insubordinate act.

Concededly, the Respondent did not repeat its suspension threat after Wayne volunteered to anchor on the afternoon of August 26. This lack of repetition, however, is not tantamount to an affirmative act of forgiveness. Moreover, over the 2 days following Wayne's refusal to perform the anchoring work, the Respondent carefully investigated and reviewed Wayne's conduct, ultimately concluding that his insubordinate refusal to anchor warranted discharge. In my view, nothing in the Respondent's conduct supports the conclusion that it condoned Wayne's misconduct.

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 threaten employees with retaliation or adverse action in order to discourage protected concerted activities.

WE WILL NOT discharge or discriminate against any employee because that employee engaged in protected concerted activities.

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

WE WILL offer Ken Wayne immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Ken Wayne that we have removed from our files any reference to his discharge and that this discharge will not be used against him in any way.

KNTV, INC.

Valerie Hardy-Mahoney, Esq., for the General Counsel.
Steven R. Feldstein, Esq. (Heller, Ehrman, White & McAuliffe), of Palo Alto, California, for the Respondent.
Andrew Baker, Esq. (Beeson, Ehrman, White & McAuliffe), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on March 22, 1993. On September 17, 1992, American Federation of Television and Radio Artists, AFL-CIO (the Union) filed a charge alleging that KNTV, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On October 30, 1992, the Acting Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the oral arguments of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Virginia corporation with a principal place of business in San Jose, California, has been engaged in the operation of a television broadcasting station. During the 12 months prior to issuance of the complaint, Respondent derived revenues in excess of \$100,000, advertised national brand products, held membership in or subscribed to various interstate news services, and transmitted programming originating outside the State of California. Accordingly, Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Ken Wayne was hired by Respondent as a freelance reporter in July 1991. That summer, Wayne applied for a position as a weekend news anchor and as a full-time reporter. In November 1991, Wayne was hired by Terry McElhatton, Respondent's news director, as a full-time staff reporter.¹ Wayne aspired to be a news anchor and on numerous occasions acted as a backup or fill-in anchor when a regular anchor was sick or on vacation. Wayne testified that he worked as a substitute anchor on at least two dozen occasions and that on each of these occasions he had volunteered to do so. Wayne never requested or received extra compensation for working as a backup or fill-in news anchor.

It is undisputed that Wayne was a superior reporter. During the summer of 1992, Wayne approached McElhatton and asked for a wage increase. Wayne offered to do extra work to justify the raise. McElhatton said that Wayne's proposal was reasonable and that he would talk to Stew Park, Respondent's president and general manager. McElhatton reported back to Wayne that Park would not consider a raise until Wayne's next review period which was November 1992.

In July, Wayne began talking to other newsroom employees about their complaints concerning wages and working conditions. On July 22, Wayne held a meeting in the news department's conference to discuss employee complaints. The meeting was attended by 18 of the approximately 30 newsroom employees. The employees discussed several options including seeking representation by the Union. The employees decided to draft a letter to Park before pursuing the union possibility. Wayne with the assistance of some fellow employees drafted a letter to Park from the news staff. In essence the letter stated that it was the consensus of the employees that they were underpaid considering the high cost of living in the area in which they lived and the recent business successes of the Respondent. Wayne placed copies of the letter in the internal mailboxes for the employees and for Park, McElhatton, and Roberto Munoz, managing editor of the newsroom. Later that day, McElhatton told Wayne that it was "an interesting letter." The letter had not mentioned Wayne or any other employee by name. The following day McElhatton told Wayne that Park wanted to meet with him individually. Wayne said that he did not want to meet individually with Park but rather as part of an employee group. McElhatton stated that Park did not want to meet with the employees as a group but would meet with them individually.

On July 27, Wayne held another meeting of nonmanagement newsroom employees. At this meeting a committee was formed of Wayne, representing reporters; Chris Penn, representing producers and writers; and Paul Morrill, representing photographers and editors. The committee sent a letter to Park and McElhatton asking them to meet with the committee to discuss wages and other concerns. This letter identified each of the three employees.

¹ Respondent and Wayne entered into an at-will-employment contract. Under this agreement Respondent reserved the right to terminate Wayne's employment with or without cause.

On July 28, McElhatton told Wayne that Park wished to speak with him about the memorandum. Wayne stated that he preferred to meet with the committee as a group. McElhatton answered that Wayne was required to meet individually with Park. Park attempted to explain Respondent's wage structure. Wayne said that he didn't want to meet individually but wanted Park to meet with the committee. Park said he wished that Wayne would discuss compensation with him and Wayne stated that he did not feel comfortable doing so in the absence of the committee. Park went through his explanation of Respondent's pay schedule and then expressed his disappointment that Wayne had chosen not to discuss the matter. Park gave Wayne a written statement which set forth the average and median pay for comparable television markets and which showed Wayne's current compensation. The statement also indicated that Wayne's next salary review would be in November. According to Wayne, at the end of the meeting, Park said "I hope you won't continue to be an agitator or instigate others." Park denies making such a statement. Park held similar meetings with other employees to discuss compensation levels and gave each such employee a statement regarding comparable television markets and his or her current wage rate.

Shortly thereafter, Wayne arranged for a meeting with a representative from the Union. Wayne distributed a notice of the meeting to all employees. On August 5, six to eight newsroom employees met with three union representatives. Wayne obtained union literature from the union representatives and returned to the station that evening. Wayne placed copies of union materials dealing with health benefits, membership rules, and retirement in the employee mailboxes.

On August 25, Wayne was told by Rob Fladeboe, a reporter, that he (Fladeboe) had been working quite a bit as a backup anchor and that he thought he should get extra pay for the extra work. Fladeboe mentioned that he had raised the matter with Munoz but that Munoz had not considered it to be serious. The next day Munoz asked Wayne to work as a backup anchor. One of the two regular anchors was on vacation and the other was sick. Munoz chose Wayne to fill in because Wayne had the lightest load that day of any of the reporters.

Wayne testified that he asked Munoz what had happened with the pay issue raised by Fladeboe the previous day. Munoz answered that nothing had come of it. Munoz asked Wayne to anchor that evening after he returned from his reporting assignment. Wayne said, "[Y]es, I'll anchor as soon as you look into the pay issue." Munoz then stated, "I am telling you to anchor." Wayne said, "I will gladly anchor as soon as the pay issue is looked into." Munoz asked if Wayne was refusing to work and Wayne answered that he was not refusing to work, rather he said, "I will gladly anchor if you get the pay issue looked into." This conversation repeated itself until Munoz finally told Wayne to go out and cover his assigned story. While Wayne was preparing to go out on his story, Munoz came over to his desk and said that he had just spoken with McElhatton. Munoz related that McElhatton had said Wayne could be suspended for refusing to work. Wayne just shrugged his shoulders.

Munoz testified that when he asked Wayne to anchor Wayne said it wasn't fair if Respondent did not pay him more for the extra work. Munoz answered that he had no control over that and that Wayne should discuss pay con-

cerns with McElhatton.² Wayne said, "[I]t still isn't fair" and said he wouldn't anchor unless he was paid more. Munoz again told Wayne to take up the pay matter with McElhatton but, in the meantime, Wayne was needed to fill in as anchor. Munoz ordered Wayne to anchor. According to Munoz, Wayne said, "I won't anchor unless you pay me extra." Munoz asked if Wayne was refusing to anchor and Wayne replied, "I am not going to anchor unless you pay me extra." Munoz then said he would contact McElhatton.³ After discussing the matter with McElhatton, Munoz told Wayne that Respondent wanted him to anchor and that his refusal to work could lead to suspension.⁴ Munoz then went to Fladeboe and told Fladeboe that he might have to fill in as anchor when he returned from his assignment. In fact, Fladeboe worked as anchor that evening.

Wayne returned from his assignment at approximately 3 p.m. McElhatton called Wayne into his office with Munoz. McElhatton said that Park felt the pay issue was a legitimate issue and that he would look into it but that Respondent had to be able to rely on its reporters to fill in as anchors. According to Wayne, McElhatton stated that he could not force reporters to anchor the news.⁵ Wayne said, "I am glad you are willing to look into it and I'll anchor tonight without extra pay." Munoz testified that at this meeting McElhatton related that Park stated that the pay issue would be discussed further and that Park had an open door policy. Wayne claimed he was being picked on. Munoz said Wayne was chosen because the story he was working on was for future release and therefore Wayne had more preparation time than any other reporter. Wayne offered to anchor the rest of that week. McElhatton, still in Respondent's employ, did not testify.⁶

On the following day, Park asked Munoz what had happened with Wayne and whether Wayne had refused to work. Munoz told Park that Wayne had refused to work three or four times unless Respondent paid him extra. Park called Stewart Beck, president of Granite Broadcasting which owns all the stock of Respondent. Park told Beck that Wayne had refused to go on the air and had attempted to renegotiate his contract. He told Beck that Wayne had filled in as an anchor before and had never objected to doing so. Beck asked what action Park thought was appropriate and Park answered termination. Park prepared a termination letter and faxed it to Beck.

²Munoz, because he works closely with the newsroom reporters, distances himself from their pay matters. He does not want such matters to interfere with the news operation. He does not know what employees are paid and has asked McElhatton to leave him out of pay matters.

³McElhatton was recovering from surgery and was not present at work when the dispute between Munoz and Wayne occurred.

⁴Respondent's standards of conduct state that insubordination is just cause for immediate dismissal.

⁵The General Counsel argues that McElhatton admitted that working as a substitute anchor was purely voluntary. I do not draw the same inference. Rather, I take McElhatton's statement to mean that Respondent could not physically force a reporter to perform as an anchor. I read no further admission into his statement.

⁶Counsel for the General Counsel sought to call McElhatton as a rebuttal witness. McElhatton was not present at the hearing and the General Counsel had not subpoenaed him. I refused to grant the General Counsel a continuance to serve McElhatton with a subpoena and closed the record.

On August 28, Beck spoke via conference call with McElhatton, Park, and Munoz. During this conversation, Beck questioned Munoz as to what had happened. Munoz explained that Wayne had refused three or four times to anchor unless he was paid more money. Beck then authorized Park to send the termination letter.

On August 28, McElhatton gave Wayne his dismissal letter. The letter states that Wayne was discharged for refusing to be a substitute anchor without immediate agreement for additional compensation. Wayne went to Park and said that the matter was a misunderstanding and that he wanted a second chance. Park said he was sorry but that there would be no second chance. McElhatton walked Wayne out of the station and told him that he had tried to prevent the discharge but could not.

A day or two later, Wayne called Beck and asked Beck to reconsider the discharge. Wayne again insisted that he had not refused to anchor but had said he would gladly anchor if Respondent looked into the pay issue. Beck took that as a confirmation of Munoz' recitation of the facts and told Wayne that he believed Park had made the right decision.

B. Conclusions

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

On either Munoz' or Wayne's version of the facts, Wayne conditioned working as a substitute anchor on favorable action on the pay issue. I credit Wayne's version that he said, "I will gladly work anchor *if you will look into the pay issue*" rather than Munoz' version that Wayne said, "I refuse to work anchor *unless you pay me extra*." I find Wayne's version to be more consistent with the dispute as to whether Wayne had refused the assignment. I further note that McElhatton did not testify or deny Wayne's version of the facts. The failure of McElhatton to testify leads to an inference that his testimony would be adverse to Respondent's case.

I find that the General Counsel has not established a prima facie case that union activities were a motivating factor in Respondent's discharge of Wayne. Whether Wayne said I will work if you address the pay issue or if he said I won't anchor unless you pay me extra, the message to Munoz and Respondent was the same. Wayne was exploiting Respondent's emergency need for a fill-in anchor to demand more pay. Munoz reported the incident to McElhatton and they both spoke to Wayne. Next, the incident was reported to Park. Munoz, McElhatton, and Park all emphasized that Respondent needed to be able to rely on its reporters to fill in as anchors. Park and Beck verified the facts of the alleged insubordination with Munoz and then made a decision on

those facts. Respondent acted swiftly and decisively. When Wayne sought reconsideration of the dismissal he confirmed that he had conditioned anchoring on favorable action on the pay issue. Wayne's activities were viewed by Respondent as insubordination. Under Respondent's policies insubordination is just cause for immediate termination. It appears clear that Wayne was discharged for conditioning working as a substitute anchor on favorable action on the "pay issue." The pivotal issue is whether Wayne was engaged in protected concerted activity when he conditioned working as a substitute anchor on favorable action regarding the question of additional pay.

Section 8(a)(1) is violated if the Respondent knows of its employees' concerted activity, if the activity is protected by the Act, and if the adverse employment action is motivated by the employees' protected concerted actions. *Kysor Industrial Corp.*, 309 NLRB 237 (1992); *Amelio's*, 301 NLRB 182 (1991). In general, to find an employee's activity to be "concerted," the Board requires that it be engaged in with or on the authority of other employees, and not solely by and on behalf of himself. *Meyers Industries*, 281 NLRB 882, 885 (1986) (*Meyers II*), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The Board will find individual conduct to be concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns of the group. *Mike Yurosek & Son*, 306 NLRB 1037 (1992); *Salisbury Hotel*, 283 NLRB 685 (1987); *Every Women's Place*, 282 NLRB 413 (1986), enf'd. mem. 833 F.2d 1012 (6th Cir. 1987). Here, the evidence does not establish that Wayne was engaged in concerted activity. Fladeboe mentioned casually, to Wayne, a desire to be paid extra working as a substitute anchor. The employees, however, did not act together nor discuss group action. Wayne never indicated that he was engaged in concerted activity. Respondent never indicated that it believed Wayne was acting concertedly. I find that the evidence leads to a conclusion that Wayne was acting by himself.

Moreover, Munoz was not involved in pay matters and had never been faced with an employee placing a condition on working as a relief anchor. Although Fladeboe had raised the issue with Munoz, neither took the matter seriously because Munoz was not involved in matters of wages or compensation. Accordingly, Munoz could treat Wayne's conduct as insubordination. Wayne made no mention either to his fellow reporters nor to Munoz of any purported intent to act on behalf of anyone but himself.

Assuming arguendo, that Wayne was engaged in protected concerted activity, I find insufficient evidence that Respondent had knowledge that Wayne's action was concerted. No employee had ever requested extra compensation for fill-in anchoring. Wayne never indicated that he was acting on behalf of other employees. I find that the General Counsel has failed to establish that Wayne was discharged for protected concerted activity.

I find no merit to the General Counsel's contention that Respondent condoned Wayne's action by waiting 2 days to terminate his employment. Park reported the incident to Beck and Beck verified the particulars with Munoz before taking action. At no time did Munoz or his superiors treat this conduct as permissible nor did they indicate to Wayne that his conduct was excused. I find that the General Counsel has

failed to establish that Respondent condoned Wayne's conduct.

As found earlier, on July 29, after discussing the basis of his pay rate with Wayne, Park said that he hoped Wayne would not be an agitator or instigator in the newsroom. In the context of Wayne's protected concerted attempt to get Park to discuss wages and other concerns with an employee committee, I find the remark to be coercive under Section 8(a)(1) of the Act. *Manimark Corp.*, 301 NLRB 599, 603 (1991); *Maine Apple Growers*, 254 NLRB 501 (1981).

CONCLUSIONS OF LAW

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

2. American Federation of Television and Radio Artists, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that they would be retaliated against for engaging in protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. Respondent has not violated Section 8(a)(3) and (1) of the Act by discharging employee Ken Wayne in August 1992.

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

THE REMEDY

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

[Recommended Order omitted from publication.]