HEINL RADIO BUSINESS LETTER

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No. 1464

HIGHER COURT REVERSES FCC IN KOA CLEAR CHANNEL CASE

A decision handed down by the U. S. Court of Appeals for the District of Columbia reverses the action of the Federal Communications Commission in excluding the appellant from participation in the proceeding of placing WHDF, of Boston, with 5 KW power on a clear channel with KOA, a Class I 50 KW station of Denver. It was a decision of great importance to the broadcasting industry and a victory for the National Broadcasting Company, licensee of KOA. Also NBC's counsel, Duke M. Patrick and Philip J. Hennessey, Jr., who appealed the case to the District Court a year ago last April.

The District Court's reversal of the FCC was likewise a victory for FCC Commissioners T.A.M. Craven and Case, who had protested against the action of the Commission in placing WHDF on KOA's clear channel, declaring: "This discrimination is inequitable and not in accordance with the best administrative and judicial practices."

Concurring in the conclusion that the appellant not only had the right to appeal to the Court but also the right to intervene in the proceeding, were Chief Justice Groner and Associate Justices Rutledge, Vinson and Stephens. Dissenting were Justices Miller and Edgerton.

The majority opinion written by Mr. Justice Rutledge was a lengthy one of which portions follow:

"The Communications Commission deals with highly technical and complex engineering and economic functions and relations, a highly organized and crowded industry serving primarily a public interest, but strongly affected with private incentive. Its functions are both regulatory and quasi-judicial. Its action in a single case often affects many persons, station licensees and others. Its hearings therefore tend to be many-party ones, in which each one appearing seeks as large a participation as possible. Often cer- issues affect some, but not other parties. Yet once a party has come in, his tendency is to have a hand in all that goes on. Cross-examination especially lends itself to abuse in such a situation. So does the opportunity to present expert testimony. Consequently, in contrast with the fundamental right to come in, to be present as a party and be heard, much in the way of discretion must be conceded to the Commission in controlling the extent to which parties may be allowed to participate. The Commission's objective of keeping the hearings within manageable bounds is to be achieved, therefore, not as has been attempted by excluding persons who rightfully should come in, but by controlling through reasonable regulation the extent to which they may take part. As to this the Commission has and rightfully may exercise much authority in various specific ways."

"It is not necessary to extend the discussion further. Appellant has shown sufficiently its right to come in. It should have been allowed to do so, as a party to the proceeding, not merely as a friend of the Commission or a member of the public. That is true, notwithstanding the extent of participation actually allowed may have been been substantially all that a party was entitled to have, though by this statement it is not intimated that this was true. That question need not be determined. It is one thing to be present as a party, and as a matter of right. It is another to appear upon favor or by sufferance. It is still another to be heard in a particular fashion or at a particular time or stage. * * *

"Without attempting therefore to blueprint the procedure to be followed with respect to the extent of appellant's participation in another hearing, we may leave such matters to the Commission's judgment, where they properly belong, subject only to compliance with the basic requirements of fair play and adequate opportunity to be heard.

"For the error in excluding appellant from participation as a party in the final and controversial stage of the proceeding, contrary to the requirement of Section 303(f) of the Act, the order must be reversed, with directions to afford appellant opportunity for hearing in accordance with the provisions of that section."

Chief Justice Groner and Mr. Justice Vinson in a separate opinion concurred in the conclusion of Judge Rutledge that appellant had not only a right to appeal to the District Court under Section 402(b)(2) of the Communications Act, but also the right to intervene in the proceeding before the Commission.

"We are, therefore, in agreement with Judge Rutledge that the case should be reversed and remanded for further hearing", they stated. "There was no default in this case."

Mr. Justice Stephens also concurred in the conclusion of Judge Rutledge that the case should be reversed and remanded for further hearing and said that he, too, was in agreement of the views expressed by Judges Groner and Vinson.

Mr. Justice Miller dissenting said: "I find no substantial allegation of injury in any of the appellant's reasons for appeal. Surely it is not enough, to secure standing to appeal on the basis of affectation of interest or aggrievement, that electrical interference will occur beyond that previously occurring. Surely some injury, actual or anticipated, should be the minimum requirement. And if injury has occurred or is threatened, what other test or measure of its substantiality could there be than that it is financial?

"It is apparent in the present case, therefore, that unless electrical interference was likely to result in financial injury appellant was not an aggrieved or affected person within the meaning of the statute. And if financial injury was likely to result, the licensee could have spelled out that fact in his reasons

for appeal. It imposes no undue burden upon one who seeks judicial review of the Commission's decision, to require that he specify clearly, unequivocally, precisely, the nature of his alleged injury. This, appellant has failed to do. Consequently, I would dismiss the appeal."

Judge Edgerton dissenting said:

"I find nothing in the Communications Act which required the Commission to give appellant a hearing; quite the contrary. Yet the Commission gave appellant a hearing. It violated neither the Act nor due process. * * *

"It may be that appellant was, as a matter of due process, entitled to some sort of hearing. The Commission's proceedings had a fact-finding aspect, and were more likely to affect appellant's interests than those of any other person. But appellant was not entitled to a hearing which should include 'the incidents of a trial in court'. Persons may be 'heard' without being 'permitted to intervene, and thus become parties'. Appellant was entitled to no more than a hearing reasonably adequate to protect its interests and reasonably practicable for the Commission and the public; in other words, to a fair opportunity to bring its facts and arguments to the Commission's attention. It had such a hearing - whether of right or of grace we need not inquire. Pursuant to the Commission's Rule 1.195, it was given an opportunity to appear and present evidence. It chose not to do so. It was permitted to, and did, file a brief and make oral argument. Nothing more was required. It was not formally a party, and some aspects of a trial at law, including opportunity for cross-examination, may have been absent. To rule, as the majority of the court in effect do, that the Commission's action was therefore erroneous, is to cramp the administrative process by forcing it into the very mold which it is designed to avoid. Since the Commission had to decide primarily a question of policy and only incidentally a question of fact, the technique of a trial would have been clumsy and wasteful."

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FELDMAN LEAVES NBC SPECIAL EVENTS POST TO AID BBC

Arthur S. Feldman, Supervisor of Special Events for the National Broadcasting Company, has been granted a leave of absence, to work with the British Broadcasting Corporation in England on programs to be short-waved to the United States and other parts of the world from the ever-increasing number of United States troops stationed in the British Isles. He will work with the Department of Outside Broadcasts of BBC, which corresponds to NBC's Special Events Division.

In his new post, Mr. Feldman, who is only 27 years old but who has been with NBC for 7 years, will be in close contact with the staff of Lt. Gen. Dwight B. Eisenhower, Commander of the American troops in the British Isles. He will be available, on an advisory basis, to other departments of BBC and will be an official consultant to Lt. Col. E. M. Kirby, Chief of the Radio Section of the Public Relations Branch of the U.S. War Department.

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NO MORE AMATEUR LICENSES TO BE ISSUED

The Federal Communications Commission has discontinued the issuance of new, renewal, or modified amateur station licenses until further order of the Commission. This action has been taken in view of the many difficult administrative problems which have arisen in connection with the issuance of amateur station licenses as a result of the war. Inasmuch as many licensees are in the military services or engaged in war industries in various parts of the country, it is impossible for such station licensees to exercise proper control of transmitting apparatus and the control of the premises upon which such apparatus is located as required by the Rules and Regulations Governing Amateur Radio Stations and Operators.

Commission Orders No. 87 and '7 A adopted in December and January respectively, require complete cessation of all amateur radio operation in the interest of national security. The Commission, however, continued to renew and modify existing amateur station licenses in view of possible utilization of such stations in connection with Civilian Defense activities. The establishment of the War Emergency Radio Service, however, will provide Civilian Defense and State Guard organizations with the desired emergency communication in connection with national defense and security. The Commission will continue its policy in regard to the issuance of new or renewed amateur operator licenses or modification of such licenses for change in operator privileges. The holder of an amateur operator license desiring to maintain his amateur status should submit application for amateur operator and amateur station license renewal in accordance with the Rules.

With respect to amateur station licenses which are valid as of the date of adoption of Order No. 87-B and are not revoked prior to their expiration, it is contemplated that the licensees thereof, who maintain valid amateur operator licenses, will be granted appropriate amateur station authorization when amateur stations are again allowed to be operated, subject to the filing of such additional applications as may be required. It is further contemplated that the future operation of amateur stations will be authorized upon such bands of frequencies as may then be allocated to the amateur service.

Insofar as it is possible and practicable to do so, the call letters of outstanding amateur station licenses will be reserved for assignment to the present station licensee upon proper application when licensing of amateur stations is resumed.

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U.S. COURT REFUSES TO VACATE RCA CONSENT DECREE

Judge Albert B. Maris in the U. S. District Court at Wilmington, refused to vacate a 10-year old consent decree between the Radio Corporation of America and the Government. This action by the Court is not only of interest to the radio industry but is of great importance to other industries as it may affect the permanence of all consent decrees made during the past 20 years.

The opinion of Mr. Justice Maris follows:

"The Government has moved to vacate the consent decrees which were heretofore entered in this suit pursuant to formal written stipulations of the parties. The motion is based upon the sole ground that in the opinion of the Department of Justice the decrees do not now promote the public interest. The motion is vigorously opposed by the defendants. It presents the question whether a consent decree may be vacated solely upon the ground stated and without proof of any change in circumstances since its entry. A subsidiary question is whether the decrees conferred benefits upon the defendants. If they did, the Government concedes that its motion must be denied. After full consideration I have reached the conclusion that the first question must be answered in the negative and the second in the affirmative. I shall state briefly my reasons for reaching these conclusions.

"A consent decree, although based upon an agreement of the parties rather than a finding of facts by the Court, is not a mere authentication or recording of that agreement. It is a judicial act and, therefore, involves a determination by the chancellor that it is equitable and in the public interest. The fact that the court may consider the opinion of the Department of Justice to the same effect does not mean that the court has abdicated its power, or failed to carry out its responsibility, to make an independent determination of the propriety and equity of the decree proposed by the parties. For as the Supreme Court pointed out in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 377, a suit for an injunction under the anti-trust laws is governed by the same principles which are applicable to suits for equitable relief generally. It is fundamental to our form of government that in such suits, as in all other matters brought before them for judicial action, the courts must act 'in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government'."

"I think it is clear, as Justice Frankfurter suggested in a dissenting opinion in Chrysler Corporation v. United States, 316 U.S., that the modification or vacation of a consent decree previously entered involves the same duty of the court independently to determine that the action is equitable and in the public interest. Accordingly I cannot accede to the contention of the Government that the sole basis of the consent decree was the Attorney General's representation to the court that it would provide suitable relief concerning the matters charged in the petition, and that consequently his present representation that it no longer serves the public inter-

est requires the court, in the absence of some benefit to the defendants, to vacate the decree without evidence or agreement.

"Furthermore I am satisfied that the defendants derived substantial benefit from the consent decrees. It has been held that such a decree in an anti-trust case binds the Government as well as the defendants even though it later appears that it was inadequate when entered, for the agreement upon which it is based is within the power of the Attorney General to make and his authority to determine what relief will satisfy the requirements of the law 'includes the power to make erroneous decisions as well as correct ones'.

"In the present case the Attorney General determined that certain relief short of that prayed for would satisfy the public interest and he agreed to the entry of decrees terminating the suit by granting that relief. Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the Government the defendants are entitled to set them up as a bar to any attempt by the Government to relitigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees. This is a very real benefit of which they would be deprived were the Government's motion to be granted.

"I do not overlook the fact that consent decrees may be set aside for lack of actual consent to the decrees as entered, for fraud in their procurement, or for lack of Federal jurisdiction. No such ground for vacating them is asserted here, however. Likewise I fully recognize the power of this court to modify the decrees upon a showing of a change in circumstances since their entry requiring such modification. It would seem, however, that such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose.

"The motion to vacate the consent decrees heretofore entered herein is denied."

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RICHARDSON, NEW NBC LONDON MAN, GETS CAPITAL SEND-OFF

Stanley P. Richardson, Special Advisor on short-wave to the Office of Censorship, who has just been made Manager of the London office of the National Broadcasting Company, received a fine send-off from his colleagues and top public relations executives in the Army, Navy and Marine Corps at a party given last Wednesday afternoon by Frank M. Russell, Washington Vice-President of NBC. Mr. Russell was assisted by Carleton D. Smith, presidential announcer and Manager of WRC, and his assistant Fred Shawn. Also present was J. Harold Ryan, Assistant U. S. Censor in charge of Radio.

Mr. Richardson, a native Virginian, was with the Associated Press many years in Washington and later was secretary to Ambassador Joesph E. Davies.

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NO SECOND PRIZE IN THIS WAR, NELSON TELLS RCA WORKERS

In an address over the Blue Network and the National Broadcasting Company, Chairman Donald M. Nelson of the War Production Board spoke to a Labor-Management Committee rally of the RCA Manufacturing Co. at Camden, N. J., and to Labor-Management Committees of the War Production Drive, declaring that in this war we'd have to win - that there is no second prize. Mr. Nelson offered congratulations to five men and a woman of the RCA who were seated on the platform at Camden who had received the Certificates of Individual Production Merit that the Government for the first time in history now accords. Chairman Nelson said:

"A great crowd of war workers assembled by a Labor-Management Committee in our eastern workshop at Camden, N.J. shows me we have come a long way in the past half year toward attaining our goals and that whole-hearted teamwork of men and management which is essential to victory, but I am aware, too, that we still have far to go. We have not won this war. We are not even winning it - yet.

"Last Spring President Roosevelt directed that I 'bring home to labor and management alike the supreme importance of war production'. This was undertaken through a War Production Drive. I invited the men and women at the machines and in management to form themselves in the American way into Labor-Management Committees and to get on with the job. Labor and Management accepted the invitation. They did get on with the job. They accepted that invitation in such a manner that tonight on this network as a guest of the Camden, N.J. Labor-Management War Production Drive Committee of RCA Manufacturing Co. I can address three and one-half million workers enrolled in similar committees in 1500 war plants from Maine to California, and can report on their work to the Nation.

"Tonight I can tell them that these efforts have been effective. The last summary showed that war production has been driven up from Pearl Harbor by 350 percent. That is a good record - but not good enough. In this game we are playing for keeps.

"No matter what was the shade of our personal opinions on the domestic questions which once worried us, we are now all of one mind. No matter what our status in peacetime America, we are all enlisted for the duration in the ranks of the defenders of democracy in a global war.

"Six months ago when the soldiers of production started mobilizing in the War Production Drive, they were asked to take on certain essential tasks. All of these tasks were intended solely to aid in producing more to win the war. But in order to get these tasks done, both Labor and Management in war plants were asked to work together through joint committees. Fairly and properly represented, Labor and Management were requested to discuss and settle differences, and to work together for the common cause of producing what we must have to survive.

"This has been done. It has not been done in every instance. You have read of the exceptions where Americans fought each other instead of the Axis. You know the rising temper of the country toward such performances. But we must not confuse the exceptions with the general rule. I am glad to report tonight that interferences with production because of disputes between labor and management have been exceedingly rare in this production drive.

"Where formed, committees were asked to see that each worker know just what his particular task was contributing toward the war. Many workers in our hurriedly reassembled war economy are disturbed and think something is amiss when they find themselves performing the same task this year as last. But many a peace-time job has become a war-time task."

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PAUL M. HOLLISTER NEW CBS VICE-PRESIDENT

Paul M. Hollister has been appointed Vice President of the Columbia Broadcasting System in Charge of Advertising and Sales Promotion, according to an announcement made by Paul W. Kesten, CBS General Manager.

Mr. Hollister's career includes a substantial total of agency experience in the H. K. McCann Company, Batten, Barton, Durstine, and Osborn, and J. Stirling Getchell, Inc., the vice-presidency of which he resigned last month. Mr. Hollister was also Executive Vice President and Publicity Director of R. H. Macy and Company for eight years.

"CBS has known and dealt with Mr. Hollister for many years past", said Mr. Kesten's statement, "both as collaborator in his agency and retail connections, and as friendly competitor when he was a director of a New York radio station. His knowledge of practical radio goes back to its early days. He has had a hand in evolving certain of radio's progressive forms, and he knows selling from both sides of the retail counter. As a creative advertising man, CBS has regarded him as one of the leaders in his profession."

Mr. Hollister started his new duties September 15th.

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Vincent Callahan, Director of Radio and Press for the Treasury's War Savings Staff, states: "Radio Bond sales by stations that have reported to date are more than satisfactory. As of September 12, returns had been received from 148 stations. These stations reported a total of $2,441,530.37 - or an average of roughly $160,000 per station reporting during the month and a half that the plan has been in operation."

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PETRILLO ON SENATE GRILL NEXT WEEK - MAYBE

The Senate sub-committee investigating the Petrillo ban adjourned today (Friday) after a two-day session until 10:30 o'clock Monday morning. Thurman Arnold #1 trust buster will probably appear at that time. There still seems to be some uncertainty if and when Mr. Petrillo will appear, but it was said that he might be put on the grill early in the week. There was no question as to the desire of the Senators to get at him.

The first witness was Elmer Davis, Director of War Information, who went over pretty much the same ground as he did in his recent letter to the Music Federation head.

"A policy which threatens the continuance of many of these stations is injurious to the national system of communication and may seriously hamper the work - for which this office (OWI) was established - of informing the people about the status and progress of the war effort and the war policies, activities and aims of this government", Mr. Davis said.

Mr. Davis declared that he had appealed to Mr. Petrillo with the approval of the War and Navy Departments, the Marine Corps, the Coast Guard, the Treasury Department, the Office of Civilian Defense and his own organization, and said that while it resulted in one small concession from the union leader, this was later revoked.

"There are more than 150 communities in this country", he said, "which are not within the jurisdiction of any local union of the American Federation of Musicians but which are served by as many or more radio stations. Many of the stations are in small communities in which there are few if any unemployed union musicians. These stations are dependent on recorded music to hold their audiences, without which they would be unable to keep going.

"This office has a direct and vital concern with the maintenance of the radio coverage in this country. It is one of the most important media for the conveyance of war information in general to the people, and may become of still greater importance when there is occasion for an emergency message from the national leadership."

Chairman James L. Fly declared that the Petrillo edict perils 40 percent of the radio programs.

"Already the radio stations are confronted with a shortage of the skilled personnel and certain critical materials and items of equipment necessary for continued operation. An industry struggling with these difficulties is now faced with the drying up of the source of over 40 per cent of its programs. This presents a serious problem which not only must be solved but must be solved quickle", the Chairman said.

Mr. Fly presented charts, compiled from questionnaires returned by 796 of the Nation's 890 stations, to show how extensive the radio broadcast industry is dependent on phonograph records and electrical transcriptions.

The charts showed that 76 percent of the total broadcast time of the average station is devoted to musical programs. Of this musical time, 55.9 percent is devoted to recorded music and 44.1 percent to live music, which means 42.6 percent of the total broadcast time is devoted to recorded music.

"True, the stations have a supply of records on hand, and they also have available to them the services of the transcription libraries. But this doesn't solve the situation. Recordings will wear out. And of immediate importance stations will lose their audiences if they can't get new tunes."

Mr. Fly said that "whereas a goodly number of network stations will be seriously and in some cases grievously affected by the ban, the great bulk of the non-network stations face the drying up of the source of most of their program material."

As "the composite picture of the station that is going to take the full force of this blow", Mr. Fly said: "He is the fellow who isn't on a national network; his power is 500 watts or less; he is located in a city which has a population of less than 50,000; his total annual time sales are less than $75,000; and after he pays his expenses he has either lost money or has a net income for the year of less than $5,000, and he still has to pay his taxes."

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U.S.O. GIVES PORTABLE RADIO HIGH SERVICE GIFT RATING

A tabulation of a survey made by the Department Store Economist, compiled from 1000 questionnaires filled out at U.S.O. headquarters by soldiers and sailors to determine among 50 gifts such as stationery, shirts, playing cards, etc. what they desired most as Christmas presents, showed portable radios to be the third highest with a percentage of 70.1%. The highest was cigarettes, with 79.4%, and waterproof wrist-watches, 75.7%. Books received a rating of 40.7%, portable phonographs 32.7%, and magazine subscriptions 47.7%.

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In the period from July 24 to August 31, NBC teletype operators handled 76,000 messages without an error. During that time, according to Harry A. Woodman, Manager of the Traffic Department, every message reached its destination and none was garbled in transmission.

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TRADE NOTES

Charles B. Brown, network Sales Promotion Manager, has been appointed NBC Director of Promotion and Advertising. Joseph A. Ecclesine will take the position vacated by Mr. Brown. Frank E. Mullen, NBC Vice-President and General Manager, announced the changes.

War Production Board Chairman Donald M. Nelson Thursday announced creation of a supreme command to keep America's war-goods manufacture in high gear and the selection of Charles E. Wilson. President of the General Electric Co. to head it with the title of Vice Chairman of WPB.

Mrs. Dorothy Hall, wife of Lieut. Commander Hall, USN, retired, of New York, amateur short-wave operator who in 1938 established communication with the isolated inhabitants of Pitcairn Island, in the South Pacific, will teach Morse code operation at Washington Square College, New York University. A class of 100 pupils, all potential Signal Corps members, will start Sept. 22.

The course is open to all men and women who have high school diplomas, including two years of mathematics. A one-time mechanic for the New York Telephone Co., Mrs. Hall discovered via her elaborate short-wave set, that false rumors of a typhoid epidemic cut off Pitcairn Island from the world. The British government then sent help in time to save the inhabitants.

The appointment of Francis C. McCall as Manager of the News and Special Events Department of the NBC, to be in active charge until a successor is named to A. A. Schechter, was announced this week.

Advertising executives, agency writers and producers, network executives and representatives have been invited by the Office of War Information to a meeting today (Friday) at 3:30 P.M. in NBC Studio 6B, Radio City, to hear addressed by William Lewis, OWI Chief of Radio; Chester LaRoche, Chairman of the Board of Young & Rubicam, and Kay Kyser. The OWI expects to hold similar meetings in Chicago and Hollywood.

Wendell L. Willkie carried out an unscheduled mission on his current tour in the Middle East, according to the Associated Press. Mary Brock, National Broadcasting Co. reporter at Teheran, Iran, reported to her home office that she was among diplomatic and military officials who greeted Willkie's plane at the airport. Willkie at once sought out Mrs. Brock and said:

"Your husband (Ray Brock, New York Times correspondent) at Ankara asked me to give you his love. In fact, he told me to kiss you."

Mrs. Brock's cable added: "Mission carried out most satisfactorily on spot."

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