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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 10

American Communications Association, CIO,
Joseph P. Selly, etc., et al.,

Appellants,

v.

Charles T. Douds, individually and as Regional Director of the National Labor Relations Board, Second Region.

MEMORANDUM FILED BY APPELLANTS AFTER ARGUMENT

POINT I

The case is not moot.

On the argument of the appeal herein, the Court, upon being informed that the American Communications Association had recently filed the affidavits provided for in Section 9(h) of the Labor Management Relations Act of 1947, inquired whether or not this case was thereby rendered moot. Both appellants and respondent agreed that, in their opinion, it would not be. The Court thereupon requested of both parties that they submit memoranda con-

cerning the difference in appellants' status should, on the one hand, 9(h) be declared invalid and unconstitutional, or should, on the other, the case be dismissed as moot.

The appellants submit that their position would suffer materially should the second alternative be taken by this Court instead of the first. For in that event the certification of the Commercial Telegraphers Union, AFL, as the collective bargaining representative of the employees of Press Wireless, Inc. (which certification is called into question by virtue of the instant proceeding) would remain in full force and effect. During the period of such certification, the appellant union would not only be prevented from representing the employees of the company as their collective bargaining representative, despite the fact that the employees desire to be represented by it, but, by virtue of Section 8(b)(4)(c) of the Act, it would be precluded from striking until that certification were set aside. This might take many months and indeed, in some circumstances, the better part of a year, as will be set forth below.

In such event, the certification of the Commercial Telegraphers Union can be vacated only as the result of a new proceeding instituted by the filing of a new petition for certification by the American Communications Association. In regard to such proceeding, several problems must be considered:

1. The contract between Commercial Telegraphers Union and Press Wireless, Inc. would constitute a bar to any certification being issued prior to its expiration date. That contract (the relevant portions of which are annexed to the memorandum submitted by the respondent) does not expire until March, 1950. Hence, March of 1950 would be the earliest possible date on which the said certification could be set aside.

2. It is probable that the certification would not be set aside until many months after March, 1950. The petition, upon being filed, would be processed by the Board in ac-

cordance with its routine procedures. Thus, upon the filing, an informal conference would be arranged by the Board. Unless both unions and the employer are in complete agreement as to the appropriate unit, the date of the election, its place, and all other relevant matters, and are prepared to execute an agreement for a consent election on that basis, any one of the parties is entitled to a hearing to determine the issues in dispute. It often takes several months before such a hearing can be scheduled; after it is held, the record must be forwarded to the Board for consideration and decision. After the determination by the Board (which may take months more) an election will be directed to be held. After the election further delays are frequently encountered arising out of objections to the conduct of the election. Common experience indicates that it might easily take from six months to a year from the date of the filing of the petition by American Communications Association and the final issuance of certification.[1]

3. The appellant union is further put to the extreme disadvantage in being required to file its petition for certification in the face of an existing contract between the company and the Commercial Telegraphers Union (executed on the authority of the invalid certification) which contract contains a union shop provision. For by virtue of this clause the employees must remain members of the Commercial Telegraphers Union as a condition of employment and they would be subjected to possible loss of their jobs

[1] Recent experience of counsel for appellants in other cases pending before the Board will serve to illustrate this point. In *Matter of Bloomingdale Stores,* a petition was filed on November 21, 1948, and an election held on March 31, 1949. Objections to the election were filed and no decision has yet been made. It is not improbable that certification is still several months off. In *Matter of Metropolitan Life Insurance Company,* a petition for a unit composed of employees in the State of Connecticut was filed on February 17, 1948; and an election was held on July 29, 1949. Objections to the election have been filed, and no certification has yet been issued. In that case final certification may be at least six months away.

should they join American Communications Association now. Accordingly, the appellant union would be put in the difficult position of being unable to secure authorizations (without which the Board will not even entertain a petition) until immediately prior to the renewal date of the contract. It cannot file a petition at once, as suggested in the memorandum submitted by the respondent, because the Board will not recognize the authorizations which American Communications Association had in 1948, when the original election, out of which this proceeding arose, took place.

On the other hand, should Section 9(h) be declared unconstitutional, the invalid election heretofore held by the Board which resulted in the certification of the Commercial Telegraphers Union, would be set aside. American Communications Association would then have several alternatives open to it. First, it could disregard the Board's procedures altogether and use its economic weapon of strike. Second, it could intervene in the pending proceeding instituted by the petition of the Commercial Telegraphers Union or file a petition of its own. It may be true that as a theoretical matter many of the delays mentioned above, which follow upon the filing of a petition, might be encountered by American Communications Association even if the statute were declared unconstitutional. However, as a practical matter, the fact that American Communications Association had the legal right to strike would make it much less likely that the employer or the minority union would engage in dilatory tactics. Moreover, in securing authorizations which would be necessary for the filing of a petition, it would not encounter the obstacle of a valid union shop contract which, as is pointed out above, now stands in the way of an intensive organizing effort.

In summary then, it may be said that should this Court dismiss the action as moot, American Communications Association will have but one alternative to assert its rights, namely, it can file a petition with all of the attendant difficulties described above. Should this case be decided in

favor of American Communications Association, that union will have two alternatives, either to file a petition or to strike.

POINT II

The Naturalization Law vis-a-vis Section 9(h).

During the course of the argument one of the Justices commented on the similarity between the language contained in Section 9(h) and that contained in the Naturalization Law. We should like to note first that while the language used is similar, it is not identical. The relevant provision of the Naturalization Law, 8 U. S. C. 705(b)(1) reads as follows: [2]

> "Section 705. Belief in government and property rights.
> No person shall hereafter be naturalized as a citizen of the United States—
>
> (a) * * *
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—
>
> (1) the overthrow by force or violence of the Government of the United States or of all forms of law;
>
> * * * * * *"

Clearly, the cases decided under this statute are not of assistance in considering the objections raised by the appellants to Section 9(h), on the grounds of vagueness. The word "supports", the definition of which constitutes one of the vexing problems in interpreting Section 9(h), does not appear in Section 705 at all. The term "unconstitutional" likewise does not appear in the Naturalization Law. The

[2] See also: 8 U. S. C. 137(c), which contains a similar provision covering classes of persons to be excluded from admission into the United States.

term "affiliated" as used in Section 705 can hardly be determinative here, as that statute, as distinguished from Section 9(h), contains a partial definition of that term which might serve as a guide.[3]

A second question is raised with respect to the apparent restrictions on belief, speech and assembly which are contained in Section 705. It is extremely doubtful whether any of these restrictions could be constitutionally applied to any field of legislation other than that of immigration and naturalization. As this Court has so frequently held, the granting of citizenship is a special privilege and no one may claim it as a matter of right. The conferring of citizenship is an act of grace on the part of the sovereign.

> *United States* v. *Ginsberg,* 243 U. S. 472.
> *Tutun* v. *United States,* 270 U. S. 568.
> *Baumgartner* v. *United States,* 322 U. S. 665.
> *United States* v. *Murray,* 48 F. S. 920.

Thus the courts have upheld the constitutionality of statutes excluding from naturalization members of certain races (8 U. S. C. 703). Certainly it could not be seriously contended that these cases could serve as a precedent permitting similar classification by Congress in other fields.

Dated, New York, N. Y., October 21, 1949.

Respectfully submitted,

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[3] See *Bridges* v. *Wixon,* 326 U. S. 135. As noted in our original brief, pp. 70, 71, even with that definition as a guide, there was infinite trouble in defining and applying the term "affiliated".