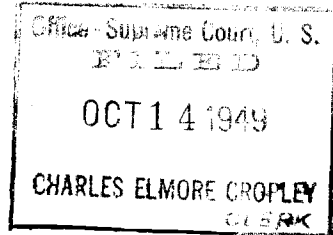


IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 10



AMERICAN COMMUNICATIONS ASSOCIATION, C.I.O.,
JOSEPH P. SELLEY, etc., et al.,

Appellants

v.

CHARLES T. DOUDS, Individually and as Regional
Director of the National Labor Relations Board,
Second Region,

Appellee

MEMORANDUM FOR APPELLEE CONCERNING THE EFFECT OF APPELLANT
UNION'S COMPLIANCE WITH SECTION 9(h) OF THE NATIONAL LABOR
RELATIONS ACT

On October 11, 1949, at the oral argument of this case, the Court, noting that American Communications Association, the appellant union in this case (herein called "A.C.A."), has recently complied with Section 9 (h) of the National Labor Relations Act, inquired how its status would differ if, on the one hand, Section 9 (h) were declared invalid, and if, on the other hand, this case were dismissed as moot.

The status of A.C.A., under the two alternatives presented, would differ in a number of material respects.

1. If Section 9 (h) were declared invalid, then, by that token, the election out of which the instant proceeding arose would become invalid, and, along with it, would fall the Board certification which, on the basis of that election, issued to the Commercial Telegrapher's Union, A. F. of L. (hereafter called "C.T.U."). Cf. Matter of Cramp

Shipbuilding Co., 52 N.L.R.B. 309, 310-312. C.T.U. would then no longer have the exclusive right to bargain on behalf of the members of the craft, and A.C.A. could immediately commence to act as representative of those employees who were its members. Matter of Bercut-Richards Packing Co., 65 N.L.R.B. 1052, 1057. And since the prior representation proceeding would still be before it, the Board would without more order a new election with both unions on the ballot.

(2) On the other hand, if the case were dismissed as moot, the certification issued on the strength of the prior election would stand. The consequences would be as follows:

(a) Until the expiration of the contract, C.T.U. would still continue to act as exclusive bargaining agent for the craft, and A.C.A. would not have the legal right to act as the representative of its members.

(b) The current contract between C.T.U. and the employer (a copy of which the Board has obtained from C.T.U.) provides for a union shop, which requires all employees in the craft to become members of the C.T.U. within thirty days of their employment.¹ The validity of this union shop agreement has been confirmed by the election required under Section 9(e)(1) of the Act. N.L.R.B., Matter of Press Wireless, Inc., 20A4334. This union shop provision remains effective until the contract expires or C.T.U. loses the right to act as craft representative. Since this provision requires all members in the craft to become members of C.T.U., it obviously handicaps the organizational activities of A.C.A.

(c) A.C.A. in competing with C.T.U. for the favor of the employees, would be forced to overcome the advantage which C.T.U. enjoys

¹The clauses in question are set forth in the Appendix annexed hereto.

by virtue of having been clothed, both by the Board and the employer, with the vestments of exclusive bargaining representative. Both Board and Court decisions have noted the advantage which a union, enjoying the status of exclusive bargaining representative and possessing the benefits of an executed contract, has over a rival in competing for employee support. Thus, this Court early declared that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees." National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 267.

(d) As long as the certification of C.T.U. is outstanding, Section 8(b)(4)(C) of the Act and Section 302 are legal bars to A.C.A.'s engaging in a strike for the purpose of compelling Press Wireless to recognize or bargain with it.

(3) Any representation petition which A.C.A. may file pursuant to Section 9(c)(1) of the Act would be required to comply with several conditions imposed by the Board's Rules.

(a) The representation petition must, under Section 9(c)(1), be predicated upon a showing that "a substantial number of employees" of Press Wireless, in the appropriate unit, wish to be represented by A.C.A. The Board's rules construe "substantial number of employees" as at least thirty percent of the employees in the appropriate unit.²

(b) The Board also has long had a "contract bar" rule, under which it will not entertain a petition for an election among employees covered by an existing collective bargaining contract until shortly

² N.L.R.B., Statements of Procedure, as amended August 18, 1948, 12 F.R. 4872, 13 F.R. 4872, Sections 202.16, 202.17. See also, N.L.R.B., Thirteenth Annual Report (Gov't. Print. Off., 1949), pp. 27-28.

before the terminal date of the contract,³ provided that the contract does not run for more than two years. Our inquiries since the argument indicate that A.C.A. could probably meet this requirement. The current contract with the employer (Press Wireless), was executed on November 1, 1948, and has a termination date of March 1, 1950.⁴ The contract indicates further that it is automatically renewable thereafter, from year to year, unless contrary notice is given by either party within sixty days of the end of the then current term. For A.C.A. to forestall the operation of the "contract bar" rule, it would, under the Board's established procedure, have to file a representation petition before the automatic renewal date,⁵ in this case December 31, 1949. The Board permits such petitions to be filed within a period of several months before the renewal date. Thus, A.C.A. could file its petition at the present time.

(c) If without the former certification having been set aside A.C.A. were to file a new petition, the petition would necessarily be handled by the Board in the usual manner, which requires an informal investigation prior to hearing, a hearing if any issues are raised by either party, the submission of the record of any such hearing to the Board for consideration and decision, and finally, the issuance of a direction of election. Experience indicates that, unless the parties stipulate to eliminate all issues upon which a hearing

³ See N.L.R.B., Twelfth Annual Report (Govt. Print. Off., 1948), pp. 9-14; N.L.R.B., Thirteenth Annual Report (Govt. Print. Off., 1948), pp. 29-32; Matter of Reed Roller Bit Co., 72 N.L.R.B. 927; Matter of California Walnut Growers, 77 N.L.R.B. 756.

⁴ A copy of the termination clause of this contract is set forth in the Appendix, annexed hereto.

⁵ See Matter of Mill B, 40 N.L.R.B. 346; Matter of General Electric X-Ray Corp., 67 N.L.R.B. 997.

might be necessary, this procedure would take several months.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel

DAVID P. FINDLING,
Associate General Counsel

A. NORMAN SOMERS,
Assistant General Counsel

NORTON J. COME,
Attorney

National Labor Relations Board

OCTOBER, 1949

APPENDIX

A G R E E M E N T

This agreement made in New York this 1st day of November, 1948 by and between Press Wireless, Inc., (hereinafter sometimes referred to as the "Company") and the Commercial Telegraphers' Union, Press Wireless Division (hereinafter sometimes referred to as the "Union") representing all the communications employees of Press Wireless, Inc. in the Continental United States, excepting those as set forth in Section 1, "Union Recognition", of this agreement.

WITNESSETH:

Section 1. Union Recognition:

The Company agrees to, and hereby does recognize the Union as the sole and exclusive bargaining agency in all matters pertaining to rates of pay, wages, hours of employment and other conditions of employment for all the Company's communications employees in the Continental United States except executives, confidential employees, all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, and clerical employees in the general offices of the Company including all accounting department employees.

Section 2. Union Shop:

The Company agrees that all employees, who may from time to time be covered by this contract, shall become members of the Union thirty (30) days after being employed by the Company and thereafter such membership in the Union shall be required as a condition of continued employment with the Company.

Section 34. Term of Agreement:

(a) Except for a wage reopening as provided for in Section 33, this agreement is to become effective on the 1st day of November 1948, and shall remain in effect until the 1st day of March 1950, and thereafter from year to year unless notice in writing shall be given by either party to the other of its termination or any changes desired not less than the sixty (60) days prior to the end of the then current term. The parties agree to commence negotiations on any proposed changes as soon as practicable after notice in writing of the changes desired has been given in accord herewith and not less than thirty (30) days prior to the end of the then current term.

(b) In the event of failure of the parties to agree upon a new contract on or before March 1, 1950, or any succeeding March 1 occurring under a renewal of this agreement, this agreement shall continue in full effect for a period of thirty days from March 1, 1950, or any succeeding March 1, occurring under a renewal of this agreement during which time all points in dispute shall be subjected to arbitration.

* * * *