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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 46-405

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, INDIVIDUALLY AND AS PRESIDENT, JOSEPH P. KEHOE, INDIVIDUALLY AND AS SECRETARY-TREASURER OF AMERICAN COMMUNICATIONS ASSOCIATION, CIO, AND CLAUDIA EZEKIEL CAPALDO,

Plaintiffs,

v.

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, SECOND REGION

Defendant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, American Communications Association, CIO, Joseph P. Selly, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel Capaldo, plaintiffs in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the order of the District Court.

This is an action brought by plaintiffs in the District Court of the United States for the Southern District of New York to enjoin the defendant who is Regional Director of the National Labor Relations Board for the Second Region, from enforcing the provisions of Section 9(h) of the National Labor Relations Act, as amended, Title 29 U.S.C.

Section 159(h), 61 Stat. 143; from conducting an election of employee representatives without placing the name of American Communications Association on the ballot, and from giving effect to a consent election agreement entered into over the protest and without the consent of plaintiff American Communications Association.

A three-judge statutory court was convened, pursuant to the provisions of Section 380a of Title 28 U.S.C. 50 Stat. 751. That statutory court on August 11, 1948, by a two to one decision entered an order dismissing the complaint on the merits and denying plaintiffs' motion for a interlocutory injunction, holding that the provisions of the statute challenged were valid and not repugnant to the Constitution.

A. **Statutory Provisions on Which Jurisdiction Rests**

The statutory provision which confers jurisdiction on the Supreme Court to review the order is Section 380a of Title 28 U.S.C. 50 Stat. 751, which reads as follows:

> "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in the hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately

two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall

take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of the law."

B. **The Statute of the United States Involved in the Action**

The validity of Section 9(h) of the National Labor Relations Act, as amended, 29 U.S.C. 159(h), 61 Stat. 143, is challenged in this action on the ground that said section is repugnant to the Constitution of the United States. This provision reads as follows:

> "9(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contempraneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

C. **Date of Judgment or Decree Sought to Be Reviewed and Date of Petition for Appeal**

The date of the judgment and order of the District Court here sought to be reviewed is August 11, 1948.

The petition for allowance of appeal was presented on August 18, 1948.

D. **Substantial Nature of the Question Presented**

This is an action instituted by American Communications Association, CIO, Joseph P. Selly, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel Capaldo. The suit was brought to restrain the Board from giving force and effect to Section 9(h) of the National Labor Relations Act, as amended, on the ground that this provision is repugnant to the Constitution of the United States in that it constitutes an impairment of the right of free speech and free assembly and is an infringement upon the rights of the plaintiffs and the other officers and members of the plaintiff labor organization to associate and join together for their common and lawful purposes, and that said section deprives the plaintiffs of liberty without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments. The section is further attacked on the ground that it is vague, indefinite and uncertain in violation of the Fifth Amendment, and on the further ground that it constitutes a bill of attainder in violation of Article 1, Section 9 of the Constitution.

This action and the two companion actions which are similarly being appealed (*Wholesale and Warehouse Workers Union, Local 65* v. *Douds,* Civil Action No. 46-157, and *Osman* v. *Douds,* Civil Action No. 46-729) are the first attacks in the Southern District of New York upon the validity of the requirements of the Taft-Hartley Act that labor organizations file the so-called "non-Communist affidavits" in order to be eligible to participate in proceedings before the National Labor Relations Board. To the best of our knowledge they are the only cases in the United States upon which appeals are currently being taken to the Supreme Court. A decision by the Supreme Court on the validity of these provisions is awaited by a substantial

number of labor organizations, both national and local. Only a decision by the Supreme Court can put at rest the many doubts and uncertainties which now prevail throughout the labor movement and which have caused numerous instances of industrial unrest.

This is not the first case before the Supreme Court in which this issue was raised. In *National Maritime Union* v. *Herzog,* Civil Action No. 4874-47, a proceeding was brought in the United States District Court for the District of Columbia to challenge the constitutionality of Sections 9(f), (g) and (h) of the Act, that union having failed to comply with any of those provisions. The Supreme Court held that Sections 9(f) and (g) were constitutional and expressly refrained from passing on the constitutionality of Section 9(h).

We do not believe that any serious contention will be made by the defendant that a substantial constitutional question is not herewith presented. As a matter of fact in *National Maritime Union* v. *Herzog,* the Solicitor General of the United States in filing a statement against the jurisdiction of the Supreme Court said "The Board agrees with the appellant that the questions relating to the constitutionality of 9(h), the affidavit provision, are substantial in character and present issues of great public importance in the administration of the Act. The Board believes it to be in public interest that there be an early final determination of the constitutionality of this paragraph." In the argument before the District Court in this proceeding, likewise, counsel for the defendant conceded that the issue raised by the complaint was a substantial constitutional issue upon which the United States Supreme Court ought to pass.

The present case, like the two companion actions, stems from a petition for certification of representations filed by a rival labor organization. American Communications As-

sociation sought to intervene in the proceedings. The National Labor Relations Board refused to permit such intervention on the ground that American Communications Association had not complied with the provisions of Section 9(h). The Board proceeded to recognize a consent election agreement entered into between a rival labor organization and the employer without the consent and over the objection of American Communications Association.

The questions presented include the following:

(1) Whether the provisions of Section 9(h) abridge the rights of freedom of speech, press and assembly guaranteed to each of the plaintiffs by the First and Fifth Amendments to the Constitution.

(2) Whether the provisions of Section 9(h) constitute a bill of attainder in violation of Article 1, Section 9 of the Constitution.

(3) Whether the provisions of Section 9(h) are repugnant to the Constitution in that they are vague and indefinite in conflict with the requirements of the Fifth Amendment.

1. *Section 9(h) abridges the rights of freedom of speech, press and assembly guaranteed to each one of the plaintiffs by the First Amendment to the Constitution.*

Labor organizations and their members both are entitled to the exercise of the basic rights provided in the First Amendment to the Constitution. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Thomas* v. *Collins,* 323 U. S. 516; *NLRB* v. *Jones & Laughlin,* 301 U. S. 1, 33, 34; *Texas & N. O. R. Co.* v. *Brotherhood,* 381 U. S. 548, 570; *Virginia Railway* v. *System Federation,* 300 U. S. 315, 543.

The complaint clearly indicates the manner in which these rights are denied to the plaintiff organization and its members. By denying to American Communications Association, CIO, the opportunity to participate in election pro-

ceedings while affording those opportunities to rival labor organizations, the basic rights guaranteed by the Constitution are impaired. If a rival labor organization is certified as a result of a proceeding in which American Communications Association is denied an opportunity to participate, American Communications Association is by the statute under consideration denied the right to strike (Section 8(b) (4) (C); Section 303(3)); or to obtain the assistance of other labor organizations in its dispute with an employer (Section 8(b)(4)(B); Section 303(2)). The statutory scheme in establishing a rival labor organization as the exclusive bargaining agency while denying to the plaintiffs the opportunity to qualify as such agency because of the political beliefs of the officers of the union results in an effective denial of the basic constitutional right to function and operate as a trade union.

The placing of the conditions contained in Section 9(h) upon the exercise of these basic rights constitutes a burden upon their exercise. Congress cannot forbid the enjoyment of a constitutional right nor can it burden or impair such right by indirection. *Thomas* v. *Collins,* 323 U. S. 516; *West Virginia* v. *Barnette,* 319 U. S. 624; *Lovell* v. *Griffin,* 304 U. S. 444; *Cantwell* v. *Connecticut,* 310 U. S. 300; *Grosjean* v. *American Press Co.,* 297 U. S. 233

Section 9(h) further violates the Constitution by adopting a test of guilt by association, a test which has been repeatedly disproved by the Supreme Court. *Schneiderman* v. *U. S.,* 320 U. S. 118; *Bridges* v. *Wixon,* 326 U. S. 135 (concurring opinion by Murphy, J.).

2. *Section 9(h) constitutes a bill of attainder in violation of Article 1, Section 9 of the Constitution.*

Section 9(h) denies certain rights to unions whose officers are members or affiliates of a specifically named political

party. By naming that political party in the legislation under attack, Congress sought to make irrelevant the activities or beliefs of that party or of its members. Congress may not legislate the conclusion that an individual or a political party holds certain beliefs or promotes certain doctrines. This is basically a judicial function, and for Congress to take over this function constitutes a bill of attainder. *United States* v. *Lovett,* 328 U. S. 303; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277.

3. *Section 9(h) is repugnant to the Constitution in that it is vague and indefinite in conflict with the requirements of the Fifth Amendment.*

Legislation must conform to the requirements of precision and freedom from ambiguity that have been established as basic to our concept of due process of law. *Small Co.* v. *American Sugar Ref. Co.,* 267 U. S. 233; *Lanzetta* v. *New Jersey,* 306 U. S. 451.

Section 9(h) does not meet these requirements since its language is not sufficiently clear and unambiguous. Terms such as "affiliated," "believe in," "teaches," and "supports" are not susceptible of exact definition, and none of them furnishes such a clear standard of meaning as to meet the Constitutional requirements. No definition of any of these terms is provided in the Act and no interpretation is available either from context or usage. Yet a failure to understand these vague terms may subject one to a severe criminal penalty.

Opinion of the Court

A copy of the opinion of the majority of the court and of the dissenting opinion of Mr. Justice Rifkind filed June 29, 1948 is affixed hereto as Exhibit A.

Conclusion

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court and that substantial questions of widespread importance are involved, requiring the review of the judgment of the statutory court on the merits.

Respectfully submitted,

VICTOR RABINOWITZ,
Counsel for Plaintiffs.

NEUBURGER, SHAPIRO, RABINOWITZ & BOUDIN,
Of Counsel.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 46-157

WHOLESALE AND WAREHOUSE WORKERS UNION, LOCAL 65, an Unincorporated Association of More than Seven Persons, Affiliated with the UNITED RETAIL, WHOLESALE AND DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO, ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY and THEODORE MARKOWSKI, *Plaintiffs,*

against

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

Civil Action No. 46-405

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, Individually and as President, JOSEPH P. KEHOE, Individually and as Secretary-Treasurer of AMERICAN COMMUNICATIONS ASSOCIATION, CIO, and CLAUDIA EZEKIEL CAPALDO, *Plaintiffs,*

against

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

Opinion of the Court

SWAN, Circuit Judge:—In case No. 1 the facts disclosed by the amended complaint and the supporting affidavits are as follows:

Local 65 is a local union affiliated with the United Retail Wholesale and Department Stores Employees of America, CIO. It has over 13,000 members in and about the City of New York, consisting of workers employed in warehouses, wholesale, processing, and distributing establishments. It has approximately 1,000 collective contracts with various employers throughout the City.

On or about July 8, 1947, Local 65 entered into an agreement with F. W. Woolworth Company, concerning employment conditions for the company's warehouse employees. That agreement expires on July 8, 1948. On May 20, 1948, Local 804 of the International Brotherhood of Teamsters and Chauffeurs, A. F. of L. filed with the National Labor Relations Board, a petition to be certified as the representative of the employees of Woolworth. Local 804 and Woolworth, with the approval of the defendant, thereupon entered into an agreement for the holding of a consent election.

Local 65 has complied with Section 9(f) and (g) of the Taft-Hartley Act, but has not complied with Section 9(h); nor can it comply because one of its officers is a member of the Communist Party. The defendant has refused plaintiff's demand for a hearing and has refused to allow plaintiff a place upon the ballot for the election to be held, solely on the ground that plaintiff has failed to file the affidavits required by Section 9(h) of the Act. The election is to take place on June 30, 1948.

Local 65, its president, Arthur Osman, its vice-president, David Livingston, its secretary-treasurer, Jack Paley and Theodore Markowski, a member in good standing of Local 65, have brought this action to restrain the defendant individually and as Regional Director of the National Labor Relations Board from conducting the election, and have moved for an interlocutory injunction. The defendant has moved to dismiss the complaint for failure to state a cause of action.

In case No. 2 the facts are similar:

American Communications Association (for brevity called A. C. A.) is a national labor organization, affiliated with the CIO. On or about August 13, 1947, it entered into an agreement with Press Wireless, Inc., concerning employment conditions of the employees of the latter. The agreement provided that it should remain in effect until August 7, 1948, and thereafter from year to year unless notice in writing be given by either party of a desire to terminate the agreement, which notice must be given not less than sixty days prior to the end of any one year. No such notice was given by either of the parties.

In June of 1948, the Commercial Telegraphers Union, affiliated with the American Federation of Labor, filed a petition with the National Labor Relations Board, to be certified as the collective bargaining representative for the employees of Press Wireless. Like in case No. 1, an agreement between the employer and the rival union was made for the holding of a consent election, which was approved by the defendant.

Plaintiff has had neither a hearing nor is it to have a place on the ballot. The defendant's refusal to grant plaintiff a hearing or a place on the ballot is based solely on the ground that plaintiff has not complied with the requirements of Section 9(h) of the Act. The election is to be held between July 8 and July 23, 1948. The action is brought by A. C. A., two of its officers, and a member in good standing and the plaintiffs have moved for an interlocutory injunction. The defendant has made a cross-motion to dismiss the complaint.

Because of the short interval between the argument on the hearing and the time set for holding the election in case No. 1, it has been impossible to prepare an opinion which could discuss adequately the various legal issues presented for decision. But they are identical with issues considered at length in National Maritime Union of America *v.* Herzog by the United States District Court of the District of Columbia, which the Supreme Court affirmed on June 21, 1948 without, however, passing on the validity of § 9(h). For the sake of expedition we shall content ourselves with referring to the National Maritime Union opinion for the reasoning which supports our decision.

We hold first, as did that court, that the individual plaintiffs have no standing to sue. We deny Local 65's motion for interlocutory injunction. Two members of the court, Judge Rifkind disagreeing, entertain doubt whether irreparable injury will result to Local 65 from excluding its namé from the ballot. Its members are entitled to vote at the election; if they constitute a majority of the employees in the collective bargaining unit, as they claim, it would seem that they can defeat the election of Local 804 and in that event the situation will remain legally exactly what it is now. But even if exclusion of Local 65 from the ballot is an adequate showing of irreparable injury, we all agree that

competing equities of greater weight justify refusal of an interlocutory injunction.

It is well established that when the right to an injunction is doubtful and the granting of a temporary injunction pending decision would work irreparable injury to a congressionally declared public policy, a court of equity will deny such relief. Dryfoos *v.* Edwards, 284 F. 596, 603 (S.D.N.Y.); Yakus *v.* United States, 321 U. S. 414, 441-2.

Finally, we sustain the constitutionality of § 9 (h) for the reasons set forth at length in the majority opinion in National Maritime Union *v.* Herzog, supra. Accordingly, the defendant's motion to dismiss the complaint is granted.

At the present time no order can be made in case No. 2. That case was brought on for argument with the other so speedily that there was no opportunity to give to the Attorney General the notice required by § 380a of the Judicial Code. Counsel for the plaintiffs proposed to attempt to procure a waiver of such notice by the Attorney General. In the event that such a waiver is hereafter filed, the case will be disposed of in conformity with the foregoing decision in case No. 1.

Dissenting Opinion

RIFKIND, *District Judge,* dissenting:

Insofar as Section 9(h) of the Taft-Hartley Act excludes from the facilities of the National Labor Relations Board any labor union, one of whose officers is a member of the Communist Party or affiliated therewith, it is incompatible with the First Amendment. It abridges the freedom of speech and the right of assembly without a showing of clear and present danger. Indeed, on the argument the defendant disavowed the presence of clear and present danger. I would deny defendant's motion to dismiss the complaint.