SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 336

AMERICAN COMMUNICATIONS ASSOCIATION, C. I. O., ET AL., APPELLANTS,

vs.

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

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 19, 1948.

—9467

[fol. 1]

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

Civil Action File No. 46-405

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, Individually and as President, Joseph F. Kehoe, Individually and as Secretary-Treasurer of American Communications Association, CIO, Claudia Ezekiel Capaldo, Plaintiffs,

against

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

COMPLAINT—Filed June 22, 1948

Plaintiffs, complaining of the defendant, allege as follows:

First. American Communications Association (hereinafter referred to as "ACA") is a national labor organization affiliated with the Congress of Industrial Organizations. ACA is a voluntary unincorporated association consisting of more than seven (7) members. Its office is located at No. 5 Beekman Street, New York, N. Y.

Second. Joseph P. Selly is the President and Joseph F. Kehoe, is the Secretary-Treasurer of ACA.

Third. Claudia Ezekiel Capaldo is a member in good standing of the plaintiff, ACA, and is an employee of Press Wireless Inc. (hereinafter referred to as "Press Wireless"), a company engaged in the transmission of communications by radio and in an industry affecting commerce within the meaning of the National Labor Relations Act, as amended (hereinafter referred to as the "Act").

[fol. 2] Fourth. The defendant, Charles T. Douds, is the Regional Director of the Second Region of the National Labor Relations Board with offices at 2 Park Avenue in the City and State of New York.

Fifth. This action, as hereinafter more fully appears, arises under the Constitution of the United States, under

the National Labor Relations Act of July 5, 1935, 29 U. S. C. A., Secs. 151-166, as amended by the Labor Management Relations Act of 1947, Public Law 101, 80th Congress (hereinafter referred to as the "Act"), a law of the United States affecting commerce and under the Administrative Procedure Act, 5 U. S. C. A., Secs. 1001 et seq., a law of the United States.

Sixth. The purpose of ACA is to unite in one union for their mutual benefit, aid and protection all workers employed in the communications industry, including telegraph employees, in the United States, to bargain collectively with employers as to wages, hours and other conditions of employment, to advance the economic, political, social and cultural interests of its members and to protect and extend the democratic institutions of the United States and the civil rights and liberties enjoyed by its citizens.

Seventh. By the terms of its Constitution, any employee within the jurisdiction of ACA is eligible for membership in the Union without regard to sex, race, color or religious or political beliefs or affiliations, and all members of the Union in good standing are eligible to be elected officers of said Union.

Eighth. ACA has collective labor agreements with numerous employers employing thousands of members of ACA.

[fol. 3] Ninth. ACA has for many years been the collective bargaining agent of the radio telegraph workers including the operators, technicians, and other employees employed by Press Wireless, and has been in contractual relations with said Press Wireless. On or about August 13, 1947, ACA entered into a collective bargaining contract with Press Wireless covering the aforedescribed employees employed by said company in the New York and California areas.

Tenth. On or about June 16, 1944, ACA was certified by the National Labor Relations Board, Second Region, as the collective bargaining representative of the employees described in Paragraph "Ninth" above.

Eleventh. The contract, dated August 13, 1947, between the parties, sets forth the terms and conditions of employment of the employees of the company, and further provides in Section 34 as follows:

"Section 34. Term of Agreement: This agreement is to become effective for a period of one year from the 7th day of August 1947, and shall remain in effect until the 7th day of August 1948, 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 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. Notice of desired changes shall not be construed as notice of termination unless and until the parties are unable to agree on the proposed changes and either party has notified the other in writing that negotiations have been broken off."

[fol. 4] Twelfth. Neither ACA nor Press Wireless has given written notice of termination of the aforesaid contract, and accordingly said contract remains in full force and effect.

Thirteenth. A substantial majority of the employees of Press Wireless covered by the contract of August 13, 1947, are members of ACA and desire to be represented by it for the purposes of collective bargaining.

Fourteenth. In or about the first week in June, 1948, the Commercial Telegraphers Union, affiliated with the American Federation of Labor, (hereinafter referred to as "CTU"), filed a petition for certification of representatives at the office of the National Labor Relations Board, Second Region, wherein said CTU sought to be certified as the collective bargaining representative for the employees of Press Wireless who are presently covered by the contract of August 13, 1947, as aforesaid. Thereafter, the defendant, as Regional Director of the National Labor Relations Board notified plaintiff, ACA, of the filing of such petition and of the fact that ACA was designated as an interested party in said proceeding.

Fifteenth. On June 16, 1948, a conference was held at the office of the defendant at which there were represented ACA, CTU, Press Wireless, and the defendant.

Sixteenth. At that conference, ACA advised the defendant that in its opinion, the contract between ACA and Press [fol. 5] Wireless was still in effect and would be so for an extended perior. ACA accordingly asked that a hearing be held to investigate and determine the issues raised by ACA. The representatives of ACA were then advised at that conference that in the opinion of the defendant a question affecting commerce had arisen concerning the representation of the employees of Press Wireless within the meaning of the National Labor Relations Act as amended, and that ACA did not have the right to a hearing on any question raised by the petition. That it did not have the right to object to a consent election pursuant to the provisions of the Rules and Regulations of the National Labor Relations Board, or to have its name appear on the ballot in any election to be conducted by the defendant, and ACA was thereupon asked to leave the said conference and was denied any right to participate further therein.

Seventeenth. Thereafter and pursuant to the aforesaid Rules and Regulations, a consent election agreement was entered into between the CTU and Press Wireless providing that the defendant should conduct an election among the employees of Press Wireless who are presently covered by a contract with ACA, said election is to be held between July 8th and July 23rd, 1948, the ballots being sent out by mail on July 8th and made returnable in New York on July 23rd, at 2:00 P. M. Said election agreement made no provision for the name of ACA to appear on the ballot in said election although ACA had demanded the right to appear on the ballot in the event that any election should be held.

Eighteenth. Sections 9(c)(1) and 9(c)(4) of the Act provide as follows:

> "(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such [fol. 6] petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice.* Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *If the Board finds upon the record of such hearing* that

such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." (Underscoring supplied.)

* * * * * * *

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the regulations and rules of decision of the Board."

Nineteenth. The foregoing provisions, together with the Rules and Regulations of the Board, require that the Board hold elections only after a hearing and only if upon the record of such hearing it finds that a question of representation exists. The hearing can be dispensed with only if all parties in interest waive such hearing. These provisions of the Act constitute a radical change from the provisions of the National Labor Relations Act prior to its amendment, which did not require hearings prior to elections for the certification of representatives and permitted the Board to hold elections prior to hearing without regard to waiver by the parties.

Twentieth. ACA is a party in interest to the proceeding for an election and has not waived its right to a hearing by stipulation or otherwise, and has not consented to the holding of such election without a hearing.

[fol. 7] Twenty-first. The sole reason assigned by the defendant for refusing to order a hearing on the questions raised by said petition despite the failure of ACA to waive such hearing, and for the refusal of the defendant to place the name of ACA on the ballot in said election, was that ACA had not filed the financial statements and affidavits required by Sections 9(f), (g) and (h) of the Act.

Twenty-second. Plaintiffs, Selly and Kehoe, have not executed and filed the affidavits required by Section 9 (h) of the Act for the reason that the requirement that such affidavits be filed constitutes an impairment of the rights of plaintiff to freedom of speech, freedom of assembly, and for the further reason that the language of the statute is too vague, ambiguous and uncertain to establish a reasonable standard of conduct. The requirement of said Section constitutes an impairment of the rights of the plaintiff

ACA, and the plaintiffs Selly and Kehoe, under Article I, Section 9 of the Constitution of the United States, and under the First, Fifth, Ninth and Tenth Amendments thereto.

Twenty-third. ACA had not, prior to the informal conference above referred to, filed with the Secretary of Labor the financial statements and other information required by Sections 9(f) and (g) of the Act because of the opinion that said provisions of the Act constitute an unconstitutional limitation upon the rights guaranteed to said plaintiff under the Constitution. However, without conceding the constitutionality of said sections of the Act, ACA did, on June 21, 1948, file with the Secretary of Labor the financial statements required by Sections 9(f) and (g) and filed with the defendant proof of compliance with said provisions of the Act.

[fol. 8] Twenty-fourth. Notwithstanding the aforesaid, the defendant has failed and refused and still fails and refuses to hold a hearing on the questions raised by the aforesaid petition, and fails and refuses to place the name of ACA on the ballot in the said election. Defendant has offered and agreed to grant the hearing requested and to place the name of ACA on the ballot in the event that said plaintiff should file the affidavits required by Section 9(h) of the Act.

Twenty-fifth. The election ordered by the Regional Director to be held on July 8, if permitted to be conducted, and unless restrained by this Court, will result in serious and irreparable injury to the plaintiffs, as well as to other members of ACA, for which there is no adequate remedy at law, in that:

A. The plaintiff ACA will suffer serious injury to its ability to represent its members employed by Press Wireless for purposes of collective bargaining, and will be threatened with interference with its freedom to organize employees at Press Wireless and elsewhere, and to establish and maintain fair wage standards and decent living conditions for its members, pursuant to the lawful purposes for which it exists;

B. ACA will be threatened with the loss of present and prospective members and the security of the union and its members will thus be imperilled.

C. In the event that ACA does not appear upon the ballot in the election to be conducted by the defendant, as above set forth, and in the event that by reason thereof a majority of the employees of Press Wireless should vote for CTU as their collective bargaining representative, ACA will be deprived of the ability to compel recognition of it as the col- [fol. 9] lective bargaining representative of the employees of the said company either by strike action, because of the provisions of Section 8 (b) (4) (c) of the National Labor Relations Act as amended and Section 303 of the Labor Management Relations Act of 1947, or in any other way, despite the fact that a majority of the employees of the said company prefer ACA as their collective bargaining representative.

D. Plaintiffs, Selly and Kehoe, will be unable to perform the duties for which they were elected and to hold office in the plaintiff union, because of their refusal to sign the aforesaid affidavits upon the ground that they constitute an interference with their constitutional rights.

E. Plaintiff, Capaldo, will be deprived of representation by the collective bargaining agent of her choice, deprived of the opportunity to work under wage standards and working conditions established and maintained by ACA, which wages and conditions are superior to any others in the industry, and will be deprived of an opportunity to vote for the union of his choice in the election which the defendant proposes to conduct.

Twenty-sixth. Said defendant has acted in an improper, illegal and arbitrary manner, threatening the plaintiffs with serious and irreparable injury in that the provisions of the Act do not provide that a labor organization failing or refusing to comply with the requirements of Section 9(h) of the Act be denied a place on the ballot in a secret election to determine the choice of collective bargaining agent, but provide only that no investigation shall be made of a question concerning representation raised by such labor organization and that no such labor organization shall be eligible for certification as the representative of employees, but the [fol. 10] defendant has, nonetheless, denied to the plaintiff union a hearing under the Act and a position on the ballot, in violation of the statute.

Twenty-seventh. As construed and applied by the defendant, the provisions of Section 9(h) are void, illegal and unenforceable and in violation of Article I, Section 9 of the Constitution of the United States and of the First, Fifth, Ninth and Tenth Amendments thereto, in that, among other things:

A. Said statute impairs free speech in violation of the First Amendment, by imposing a restraint upon the political opinions and the expressions thereof of the plaintiffs, Selly and Kehoe, and of the other officers of the plaintiff union.

B. Said statute impairs free assembly in violation of the First Amendment, by depriving the members of plaintiff union, including the individual plaintiff, of their right to elect officers of their own choosing and by seeking to prevent said members from observing the lawful provisions of the constitution of the said union, which prohibits discrimination on account of political beliefs.

C. Said statute is vague, indefinite and uncertain, and prescribes no ascertainable standard of conduct, so that any officer of the plaintiff union, including plaintiff officers, executing the affidavit specified therein in order to protect the rights of the members thereof is afforded no reasonable assurance that he will not be prosecuted under Section 35A of the Criminal Code.

D. Said statute is in effect a bill of attainder in violation of Article I, Section 9 of the Constitution, in that it imposes [fol. 11] disabilities upon plaintiffs and upon the members of plaintiff union for acts and beliefs which are not in violation of any law or statute.

E. Said statute imposes an unreasonable restriction upon the exercise of the rights of free speech and assembly by the officers and members of the plaintiff union in that it compels the loss of valuable property and other rights, as hereinbefore set forth, as a condition to the exercise of the rights of free speech and assembly, in violation of the First Amendment and the Fifth Amendment.

Twenty-eighth. The enforcement by the defendant of said void, illegal and unconstitutional provisions of the law, as hereinbefore set forth, is improper, illegal and arbitrary

and threatens the loss by the plaintiffs of valuable rights, as has been more particularly described herein, unless the plaintiffs surrender the exercise of basic rights guaranteed by the First Amendment, all in violation of the due process clause of the Fifth Amendment.

Twenty-ninth. By reason of the aforesaid conduct of the defendant in refusing to order a hearing upon the issues raised by the aforementioned petition, in violation of the provisions of the Act and in further violation of the Rules and Regulations of the Board as hereinabove set forth, ACA has been denied the right to a hearing as provided in the Act and has been denied a hearing in violation of the due process clause of the Fifth Amendment of the Constitution.

Thirtieth. Plaintiffs have exhausted all administrative remedies and there is no other remedy afforded by law or statute against the illegal acts and conduct of the defendant, save the equity powers of this Court, since the defendant can enforce said statute without resort to any court where its lawfulness can be determined, and unless the relief prayed for is granted, plaintiffs will suffer irreparable loss and damage.

[fol. 12] Thirty-first. Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray that a three-judge court be convened, pursuant to Title 18, U. S. C. A., Sec. 3802, and for the following relief:

1. That the defendant, his agents, representatives and attorneys, be permanently enjoined and restrained from holding or conducting any election, from announcing the results thereof, or from issuing any certification based thereon, pursuant to the consent election agreement between CTU and Press Wireless, or otherwise.

2. That the defendant, his agents, representatives and attorneys, be permanently enjoined and restrained from holding or conducting any election, from announcing the results thereof, or from issuing any certification based thereon or taking any further proceeding unless and until a hearing is held as aforesaid.

3. That the defendant, his agents, representatives and attorneys, be permanently enjoined and restrained from

holding or conducting any election, from announcing the results thereof, or from issuing any certification based on the petition filed by CTU for certification as the collective bargaining representative of employees of Press Wireless without placing the name of plaintiff ACA on the ballot.

4. For an interlocutory injunction pending the trial of this action for the relief requested in paragraphs 1, 2 and 3 hereinabove.

5. For a temporary restraining order pending the hearing and determination of a motion for a temporary injunction herein.

[fols. 13-14] 6. For such other and further relief as to the Court may seem just and proper.

Yours, etc., Victor Rabinowitz, Neuburger, Shapiro, Rabinowitz & Boudin, Attorneys for Plaintiffs. Office & P. O. Address, 76 Beaver Street, Borough of Manhattan, City of New York.

[fol. 15] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER TO SHOW CAUSE—Filed June 30, 1948

Upon the annexed affidavit of Lawrence F. Kelly, sworn to the 22nd day of June 1948, and upon the summons and complaint herein,

Let the defendant show cause before this Court at a motion part thereof before a three-judge statutory court, convened and held pursuant to Title 28, U. S. Code, Section 380a on the 24th day of June 1948, at 11 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard at the United States Court House, Room 506, Foley Square, New York, New York, why a temporary injunction should not be issued pending the trial of this action:

a. Temporarily enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting any election, from announcing the results thereof pursuant to the consent election agreement between Commercial Telegraphers Union A. F. L. (hereinafter referred

to as C. T. U.) and Press Wireless, Inc., or otherwise, relating to the employees of the said company;

[fol. 16] b. Temporarily enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting any election, from announcing the results thereof, or issuing any certification based upon a petition filed by C. T. U. for certification as the collective bargaining representative of employees of Press Wireless, Inc., except after hearing, at which plaintiff union shall have an opportunity to appear and present evidence and except after placing the name of plaintiff union on the ballot;

And why the Court should not order such other and further relief as may seem just and proper.

Sufficient cause appearing therefor, let service of a copy of this order at or before 5 P. M. on June 22nd on the defendant personally or by leaving a copy with any of his agents, representatives, attorneys or employees at his office, 2 Park Avenue, New York, N. Y., be deemed sufficient.

Dated: New York, N. Y. June 22, 1948.

John W. Clancey, U. S. D. J.

[fol. 17] In District Court of the United States

[Title omitted]

Affidavit of Lawrence F. Kelly—Filed June 30, 1948

State of New York,
County of New York, ss:

Lawrence F. Kelly, being duly sworn, deposes and says:

That I am the Vice-President of the Radio and Cables Department of the plaintiff ACA. That I am fully familiar with all of the facts hereinafter set forth upon which this proceeding is based.

As the complaint points out, the plaintiff union is a national labor organization with jurisdiction over employees in the field of communications covering radio telegraph workers among others. The purposes for which the union was created and for which it exists are similar to those for which other trade unions exist. We seek by means of

organization and collective bargaining to improve the wages and working conditions of members of our union and all others employed in the same industries.

The union has, since June of 1944, been the collective bargaining representative of the employees employed by Press Wireless Inc. (hereinafter referred to as Press Wireless). It [fol. 18] was certified by the National Labor Relations Board of the Second Region as the collective bargaining representative of the employees of Press Wireless in the New York area and the California area on or about June 16, 1944. It has been in contractual relations ever since that time. Its most recent agreement was entered into on August 13, 1947. The agreement of August 13, 1947 provides that it shall be effective as of August 8, 1947. The clause providing for its termination reads as follows:

> "Section 34. Term of Agreement: This agreement is to become effective for a period of one year from the 7th day of August 1947, and shall remain in effect until the 7th day of August 1948, 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 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. Notice of desired changes shall not be construed as notice of termination unless and until the parties are unable to agree on the proposed changes and either party has notified the other in writing that negotiations have been broken off."

Neither ACA nor Press Wireless served any notice of termination pursuant to the provisions of the above quoted paragraph, and accordingly the contract between the parties is in full force and effect.

Early in June, the Commercial Telegraphers Union, affiliated with the American Federation of Labor, (hereinafter referred to as the "CTU"), filed a petition to represent the employees covered by the contract between ACA and Press Wireless, with the National Labor Relations Board, Second Region. On June 8th, ACA was formally

advised by the National Labor Relations Board that the CTU had filed the petition for an election under Section 9(c) of the Labor Management Relations Act of 1947, and [fol. 19] that a conference on the said petition would be held at the offices of the Board on Wednesday, June 16, 1948.

On that date, a conference was held at the Board at which were present representatives of ACA including myself, representatives of CTU, representatives of Press Wireless, and of the defendant, the Regional Director of the National Labor Relations Board. At that conference, ACA advised the defendant that it had a contract which was currently in effect which it felt to be a bar to any election which might be held by the National Labor Relations Board. The defendant thereupon advised the parties that it considered the contentions of ACA to be without merit, and suggested a consent agreement for an election be entered into between the CTU and Press Wireless.

ACA then asked that a hearing be held on the issues raised by it, which request was denied by the defendant who thereupon ordered that ACA leave the conference as having no further interest in the proceeding. The defendant advised ACA that it was not entitled to a hearing or to be placed on the ballot in any election which would be scheduled in view of the fact that it had not signed the affidavits required by Section 9(h) of the Act, and in view of the further fact that it had failed to submit the financial statements required by Section 9(f) and (g). The defendant pointed out that under the circumstances, ACA's consent was not required under the Rules of the Board, and that no hearing would be held despite ACA's refusal to waive [fol. 20] a hearing. Press Wireless and CTU then entered into a consent election which was to be conducted by mail balloting, the ballots to be mailed out on the 8th day of July, 1948, and to be returned on or before July 23, 1948, at the New York office at 2:00 P. M.

It is self evident, of course, that the election which the Regional Director intends to hold, unless restrained by order of this Court, is hardly a free election designed to ascertain the true wishes of the employees of the Company. An election in which the name of one of the contending parties is omitted from the ballot is hardly calculated to protect the interests of the persons participating in the election.

The vast majority of the employees of the Company desire, in my opinion, to be represented by ACA for the

purpose of collective bargaining. Despite this fact, the failure of the Union of their choice to appear on the ballot makes it not unlikely that many of the workers, who actually desire to be represented by ACA will, in fact, vote for the CTU. This is particularly true since the alternative presented to the workers on the face of the ballot is not whether they wish to be represented by the CTU or by ACA but rather whether they wish to be represented by the CTU or by no union at all.

Since all of the workers in the Company, virtually without exception, recognize the desirability of being represented by a union, many of them may be induced to vote contrary [fol. 21] to their desires because of the form of the ballot.

As is pointed out above, the sole reason given by the Regional Director for his failure to include ACA on the ballot is that neither I nor my fellow officers have signed the affidavits required by Section 9(h) of the Act nor had the Union at that time filed the financial statements required by Sections 9(f) and (g) of the Act.

Since that time and on June 21, 1948, the plaintiff has filed the statements necessary in order to comply with Sections 9(f) and (g) of the Act. This was done without conceding the constitutionality of said Sections of the Act, but merely to facilitate the bringing of the action herein, and in order to get a prompt determination of the constitutionality of Section 9(h) of the Act, for while it is felt that Sections 9(g) and (h) interfere with the constitutional rights of the plaintiff and its members, it is felt that the interference with basic principles and constitutional rights which Section 9(h) imposes are so basic that it would be best to have a determination thereon made as promptly as possible and avoid the necessity of waiting for any decision on the questions raised by refusal to comply with Sections 9(f) and (g).

Since the filing of the financial statements required by Sections 9(f) and (g), a further demand was made upon [fol. 22] the defendant for a hearing and for a right to appear on the ballot. This demand was denied by the defendant.

As is pointed out in the Complaint, our Constitution forbids the Union to discriminate against any member because of sex, color, race or religious or political beliefs or affiliations. We probably have among our members persons who are members of all political parties, including Commu-

nists. We have no way of knowing how many such members there are since we do not inquire into the political beliefs of our members nor do we take a census of their affiliations. We would consider any inquiry into the political beliefs of a member as improper as an inquiry into his religious beliefs. We believe, and we practice what we preach, that a member of our union is entitled to hold any beliefs he may wish and that he may exercise all of the rights and privileges of a member so long as he does not violate the Union constitution.

I likewise consider any inquiry into my religious or political beliefs to be highly improper. I understand that I have, under the Constitution of the United States, the right to hold any political beliefs I wish and to either make those beliefs known or stand silent concerning them. These rights I consider to be basic to American liberties and I would be derelict in my duty as an American citizen if I did not take a stand in protecting and safeguarding those rights.

It is evident, of course, and the Complaint amply demonstrates that all of the plaintiffs will be irreparably injured if the election is permitted to proceed without ACA being on the ballot. If CTU wins the election, ACA will be unable to strike or otherwise compel recognition of it by the Employer because of the provisions of Section 8(b)(4)(C) [fol. 23] of this Act and Section 303 of the Labor Management Relations Act, 1947. If CTU loses the election, the workers employed by the Company will be without representation of any sort. The one thing which the workers want, namely representation by ACA, will be denied to them.

In practical effect, the defendant has given the plaintiffs a choice: to surrender the rights guaranteed to them under the Constitution or to lose the right to bargain collectively through their organization. Only this Court, in the exercise of its equity powers, can prevent the imposition of disabilities so inconsistent with the constitutional rights of the plaintiffs.

This proceeding seeks a permanent injunction to restrain the defendant from holding or conducting any election or issuing any certification based on the consent election agreement signed between CTU and Press Wireless, and further, that the defendant be permanently enjoined from holding

any election on the petition filed by CTU without placing the name of ACA on the ballot.

By way of interlocutory relief pending the trial of the action, plaintiff prays for an injunction to restrain the holding of the election as above set forth. Obviously, the holding of the election will seriously prejudice the plaintiffs, and in order to protect the interests of the plaintiffs, no election should be held until the critical constitutional issues raised in this proceeding have been decided.

Since the constitutionality of the National Labor Relations Act as amended, is directly attacked by this action, and since an interlocutory judgment is sought by the plaintiffs on that ground, it is necessary that a three-judge statutory [fol. 24] court be appointed in accordance with Title 28, United States Code, Section 380(a).

I am advised by my attorneys that there is presently pending in this Court, an action entitled, "Wholesale and Warehouse Union, etc. v. Douds, etc.", Civil Action 46-157, in which precisely the same issues are raised as are present in this action. I understand that a three-judge statutory court has been appointed in that proceeding and that it will hear argument on Thursday, June 24th, at 11:00 A. M. I understand that Judge Cox, who appointed that three-judge court, has been consulted on the matter, and that he suggested that this application be made returnable at the same time and place so that argument in both proceedings may be joined. In this way it will be unnecessary to secure the appointment of another three-judge court to hear argument on precisely the same point. Of course, if upon the return date, the court appointed as aforesaid prefers not to hear argument in this case, another court can be appointed and another date for argument can be set.

I am also advised by my attorneys that counsel for the Labor Board has been consulted on the matter and has no objection to the joinder of both cases for argument.

In this way also, a temporary restraining order pending argument need not be made since the application for such an order can be made to the statutory court at the time of argument.

No previous application has been made for the relief requested herein.

WHEREFORE, the plaintiffs request that an interlocutory injunction be issued by a statutory court as aforesaid pending the trial of this action:

[fol. 25] (a) Temporarily enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting any election, from announcing the results thereof, or from issuing any certification based thereon pursuant to the consent election agreement between CTU and Press Wireless, or otherwise;

(b) Temporaily, pending the final determination of this action, enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting an election, from announcing the results thereof or issuing any certification based on the petition filed by CTU for certification as the collective bargaining representative of employees of Press Wireless presently covered by the collective bargaining contract dated August 13, 1948, between ACA and Press Wireless, except after placing the name of American Communications Association on the ballot.

Lawrence F. Kelly.

Sworn to and subscribed before me this 22 day of June, 1948. Thomas R. Jones.

[Stamp:] Thomas R. Jones, Attorney & Counsellor-at-law; State of New York. Office address: 76 Beaver St., N. Y. 5, N. Y. Residing — Kings —— —— 177-J-9. —— —— 283 Reg. A-263——9. Commission expires March 30, 1949.

[fol. 26] 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

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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 ware- [fol. 27] houses, 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 Sections 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 in 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.

[fol. 28] 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 [fol. 29] 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, entertained doubt whether irreparable injury will result to Local 65 from excluding its name 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.

[fol. 30] 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.

[fol. 31] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action

File 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, Claudia Ezekiel Capaldo, Plaintiffs,

against

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

ORDER DENYING MOTION FOR TEMPORARY INJUNCTION AND DISMISSING COMPLAINT—Aug. 11, 1948

Application having been made for an interlocutory injunction by a three-judge statutory court in the above entitled matter, and upon the summons, amended complaint, order to show cause and supporting affidavit submitted on behalf of plaintiffs, and the defendant having moved to

dismiss the amended complaint for failure to state a claim upon which the relief can be granted, and after having heard Victor Rabinowitz, Esq., attorney for plaintiffs, in support of said application and in opposition to said motion, and Mozart Ratner, Esq., attorney for the defendant, and it appearing that the Attorney General of the United States has waived the notice required to be given him under the provisions of Section 380a of the Judicial Code by letter dated August 5, 1948, it is hereby

ORDERED, that the plaintiffs' application for an interlocutory injunction be denied, and it is further

[fols. 32-33] ORDERED, that the defendant's motion to dismiss the complaint be granted.

Dated: New York, N. Y., August 11, 1948.

Thomas W. Swan, Circuit Judge; Alfred C. Coxe, District Judge; —— ——, District Judge.

[fol. 34] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

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, in connection with their petition for an appeal to the Supreme Court of the United States, hereby assign error to the entry of the order, and the opinion rendered therewith, entered on the 11th day of August, 1948, in the above entitled cause, and say that in the entry of the opinion and order the District Court committed error to the prejudice of the said plaintiffs in the following particulars:

1. The Court erred in granting defendant's motion to dismiss the complaint and in dismissing the complaint.

2. The Court erred in failing to issue an interlocutory injunction as prayed by plaintiffs.

3. The Court erred in holding that plaintiffs Selly, Kehoe [fol. 35] and Capaldo lacked capacity to sue.

4. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as 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 right of the plaintiffs and of the other officers and members of the plaintiff union to associate and join together for their common welfare and for the effectuation of their common and lawful objectives and aims, and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments.

5. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it is vague, indefinite and uncertain and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the Fifth Amendment.

6. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it constitutes a bill of attainder in violation of Article 1, Section 9.

WHEREFORE, plaintiffs pray that the order of the District Court dismissing the complaint and denying plaintiffs' application for an interlocutory injunction be denied.

Aug. 18, 1948.

Victor Rabinowitz, Neuburger, Shapiro, Rabinowitz & Boudin, Attorneys for Plaintiffs.

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

It appearing to the court that the plaintiffs, 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, have filed their petition for appeal to the Supreme Court of the United States, and have filed therewith their assignment of errors, and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the order of the Court entered herein on August 11, 1948, it is

Ordered that the appeal prayed for be and the same hereby is allowed and granted to the Supreme Court of the United States from the order rendered in this cause on the 11th day of August, 1948, and that the record on appeal be made and [fols. 37-40] certified and sent to the Supreme Court of the United States in accordance with the rules of that court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered further that the plaintiffs give a bond with good and sufficient surety in the sum of Two Hundred Fifty Dollars ($250.00), that they as appellants shall prosecute their appeal and answer all damages and costs if they fail to make their appeal good.

Harold R. Medina, U. S. D. J.

Aug. 19, 1948.

[fol. 41] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL

To: A. Norman Somers, Assistant General Counsel, National Labor Relations Board.

SIR:

Please take notice that pursuant to the Statutes of the United States and Rules of the courts in such cases made and provided, 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 action, have appealed to the Supreme Court of the United States from the order of the District Court of the United States for the Southern District of New York, entered on the 11th day of August, 1948.

There is attached hereto, pursuant to paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States, copies of the following documents:

Petition for Appeal.
Order allowing the appeal signed by a Judge of the District Court for the Southern District of New York.
[fols. 42-46] Assignment of Errors and Prayer for Reversal.
Statement as to Jurisdiction, to which is attached Exhibit A.

Your attention is directed to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States which reads as follows:

> Within 15 days after such service the appellee may file with the clerk of the Court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this Court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm; where such a motion is made, it may be opposed as provided in Rule 7, Paragraph 3.

Victor Rabinowitz, Neuburger, Shapiro, Rabinowitz & Boudin, Attorneys for Plaintiffs.

August 20, 1948.

[fol. 47] SUPREME COURT OF THE UNITED STATES

Appellants' Statement of Points and Designation of Parts of Record to Be Printed Pursuant to Rule 13, Paragraph 9, of the Revised Rules of the Supreme Court of the United States—Filed October 14, 1948

STATEMENT OF POINTS TO BE RELIED UPON

1. This Court has jurisdiction over the subject matter of the complaint in that, among other things, it involves the issue of the constitutionality of an Act of Congress.

2. Section 9(h) of the Labor Management Relations Act effects a limitation on the rights guaranteed by the First Amendment of the Constitution and therefore there is a presumption of its unconstitutionality.

3. Section 9(h) of the Labor Management Relations Act abridges the rights guaranteed to each of the plaintiffs by the First, Fifth, Ninth and Tenth Amendments to the Constitution.

4. Trade unions as well as their officers and members are entitled to the protection of the First and Fifth Amendments.

5. Plaintiff union, its officers and members, have property rights of which they have been deprived by reason of the provisions of Section 9(h) of the Labor Management Relations Act, and its application.

[fol. 48] 6. Political rights of free speech and affiliation, and the right of union members to choose their own officers, involve constitutional rights of freedom of assembly, association and speech, which are protected by the First Amendment and which are infringed upon by Section 9(h) of the Labor Management Relations Act.

7. A legislative declaration of guilt which is contained in a bill of attainder is *a fortiori* a violation of the due process clause of the Fifth Amendment.

8. Denial of government services and facilities must be in accord with constitutional guarantees.

9. The legislature may not impose restrictions on the freedoms guaranteed by the First and Fifth Amendments in the absence of a clear and present danger to the community. There is no clear and present danger which this section of law is designed to meet.

10. Section 9(h) of the Labor Management Relations Act effects a curb upon opinion and belief which enjoy constitutional immunity from any regulation.

11. The method of enforcing Section 9(h) of the Labor Management Relations Act does not save its constitutionality. On the contrary, the respondent's method of enforcement of this Section emphasizes its unconstitutionality.

12. Even if there were a rational basis for Section 9(h) of the Labor Management Relations Act, that in itself would be insufficient to warrant the restrictions of civil liberties which it imposes.

13. The rights guaranteed by the First, Fifth, Ninth and Tenth Amendments may not be abridged by indirection.

14. Section 9(h) of the Labor Management Relations Act is unconstitutional because of the vagueness of its terms.

[fol. 49] 15. Section 9(h) of the Labor Management Relations Act is unconstitutional because it seeks to adopt the unconstitutional test of guilt by association.

16. Section 9(h) of the Labor Management Relations Act is repugnant to Article I, Section 9, of the Constitution, as being a bill of attainder.

DESIGNATION OF PARTS OF THE RECORD DEEMED NECESSARY BY APPELLANT

(1) Complaint, filed on June 22, 1948.
(2) Order to Show Cause, dated June 22, 1948 and filed June 30, 1948.
(3) Affidavit of Lawrence F. Kelly, dated June 22, 1948 and filed June 30, 1948.
(4) Opinion of the Court.
(5) Order denying motion for temporary injunction and dismissing the complaint, dated August 11, 1948.
(6) Notice of Appeal.
(7) Assignment of Errors and prayer for reversal.

Victor Rabinowitz; Neuburger, Shapiro, Rabinowitz & Boudin, Attorneys for Appellants, 76 Beaver Street, New York, New York.

New York, New York, October 12, 1948.

[fol. 50] AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Belle Seligman, being duly sworn, deposes and says that she is an attorney in the offices of Neuburger, Shapiro, Rabinowitz & Boudin, attorneys for the above named appellants herein. That on the 12th day of October, 1948, she served the within Statement upon A. Norman Somers by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 76 Beaver Street, in said County of New York, directed to said attorney for the respondent at 815 Connecticut Avenue, N. W., Washington, District of Columbia, that being the address within the District designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Belle Seligman.

Sworn to before me this 12th day of October, 1948.
Kate Scherer, Notary Public, State of New York.

[fol. 50a] [File endorsement omitted.]

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—November 8, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 53,338, U. S. D. C., Southern New York, Term No. 336. American Communications Association, C. I. O., et al., Appellants, vs. Charles T. Douds, Individually and as Regional Director of the National Labor Relations Board, Second Region. Filed October 4, 1948. Term No. 336, O. T. 1948.