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Reviewable Order

NOTES AND COMMENTS

ADMINISTRATIVE LAW

REVIEWABLE ORDER

The Federal Communications Commission ordered that no license would be granted to a broadcasting station having certain specified kinds of contracts with networks.[1] Plaintiff network and another brought suit in a federal district court to enjoin enforcement of the order.[2] The district court dismissed for want of jurisdiction,[3] and plaintiff appealed to the Supreme Court. *Held*, the regulation was a reviewable "order", and that the review had been properly brought in the district court.[4]

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1. F.C.C. Order of May 2, 1941, 6 Fed. Reg. 2282 (1941), as amended by F.C.C. Order of October 11, 1941, 6 Fed. Reg. 5257-58. The text of the regulations is reprinted at 316 U.S. 425, 62 S. Ct. 1204, 44 Fed. Supp. 693, and F.C.C. Regulation of Competition Among Radio Networks (1942) 51 Yale L. J. 452, note 32. Briefly stated, the order provides that no license will be granted to a broadcasting station having contracts with a network which contracts: exclude broadcasts of other networks' programs; restrict other stations in the same area from broadcasting the network's programs not taken by the first station; are for a period of more than two years; give an option time of less than 56 days for the selection of network programs; prohibit a station from rejecting any network programs it chooses; and other minor contract provisions.
2. Suit was brought in the district court under the authority of the Communications Act, 48 Stat. 1093 (1934), 47 U.S.C.A. §402 (a) (1941), which extends the application of the Urgent Deficiencies Act, 38 Stat. 220 (1913), 28 U.S.C.A. §§47, 47 (a) (1941) to "suits to . . . enjoin . . . any order of the [Federal Communications] Commission except any order . . . granting or refusing an application . . . for a radio station license, or for modification of an existing station license . . ." The Urgent Deficiencies Act incorporated into 47 U.S.C.A. §402 (a) provided for a review in the district court with the right to appeal directly to the Supreme Court.
3. National Broadcasting Co. v. United States, 44 Fed. Supp. 688 (1942) (the companion case to the instant one). The ground stated by L. Hand, J. at 692 was that the review should have been brought under 47 U.S.C.A. §402 (b) instead of §402 (a). §402 (b) provided that review of the commission's decisions should be taken in the United States Court of Appeals for the District of Columbia for all cases coming within the exceptions of §402 (a) noted supra, note 2. Cf. Scripps-Howard Radio, Inc. v. Fed. Communications Comm., 316 U.S. 4, 62 S. Ct. 875 (1942). Judge Hand also indicated at 692 his uncertainty as to whether the commission's regulations should be regarded as an "order" subject to review under §402 (a) even if it were applicable.
4. Columbia Broadcasting System, Inc. v. United States et al., 316 U.S. 407, 62 Sup. Ct. 1194, 86 L. Ed. 1066 (1942), Justices Frankfurter, Reed, and Douglas dissenting. Since the regulations themselves neither grant, deny, or modify any license, any review before an application for a license has been acted upon is not an exception to §402 (a), and review must be brought according to the

It seems certain that before judicial review of any administrative regulations can be obtained, the regulations must amount to not only an "order",[5] but a "final order".[6] The fact that the commission called the regulations an "order" is immaterial.[7] The real test of whether they partake of orders seems to be one of substance, with the stress falling on whether or not the rights of individuals or the relationships of individuals are affected.[8]

The regulations in question are of a dual nature. They affect the contractual relationship between radio networks and stations, and also limit the power of stations to secure a new license or a renewal of

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specifications of that section pertaining to orders. The majority opinion at 316 U.S. 407, 420, 421, 62 Sup. Ct. 1202 held the regulations in controversy constituted a definite "order" determining the contract rights of plaintiff network. The district court in 44 Fed. Supp. 688, 692, and the dissenting opinion of Justice Frankfurter in the instant case at 316 U.S. 431, 64 Sup. Ct. 1207, take the contrary position, saying the regulations amounted only to a declaration of the commission's policy regarding the issuance of future licenses and hence was not a reviewable "order" within the meaning of §402 (a). They cite in support of this position the Minute of October 31, 1941 (reprinted at 316 U.S. 428 62 Sup. Ct. 1205 and 44 Fed. Supp. 694) passed by the commission the day after suit was filed in the district court. In effect, the Minute stated that any station could ". . . contest the validity of the . . . regulations . . . or the reasonableness of their application . . . [by having its] license . . . set for hearing," and to insure that the station might remain on the air, provision was made for the extension of the station's existing license until a final determination could be reached. It was contended from this that the flexibility of the regulations as to future licensing matters connoted more "policy" than "order".

5. 47 U.S.C.A. §402 (a).

6. United States v. Los Angeles R.R., 273 U.S. 299 (1927) (Where an order evaluating the property of a railroad by the Interstate Commerce Commission was held to be merely a statement of the result of an investigation and not a reviewable "final order"); United States v. Ill. Central R.R., 244 U.S. 82 (1917) (where an I.C.C. "order" assigning a cause for action was held not to be a reviewable order); cf. where interlocutory orders were held non-reviewable: Sec. & Exchange Comm. v. Andrews, 88 F. (2d) 441 (1937); Philadelphia C.P.Ry. Co. v. Pub. Service Comm. of Pa. 271 Pa. 39, 114 Atl. 642 (1921); Utah Consol. Mining Co. v. Industrial Comm. of Utah, 66 Utah 173, 240 Pac. 440 (1925). Contra: State v. N.H. Gas & Elec. Co., 85 N. H. 218, 156 Atl. 816 (1931).

7. A.F. of L. v. N.L.R.B., 308 U.S. 401 (1940); Powell v. United States, 300 U.S. 276 (1937).

8. A.F. of L. v. N.L.R.B., 308 U.S. 401 (1940) "We must look rather to the language of the statute, read in the light of its purpose . . . to ascertain whether the 'order' for which review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions." Rochester Tel. Co. v. United States, 307 U.S. 125 (1939) (where an order determining status was held reviewable); Powell v. United States, 300 U.S. 276 (1937) "Overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect." Cf. United States v. Los Angeles R.R., 273 U.S. 299 (1927); United States v. Ill. Central R.R., 244 U.S. 82 (1917).

an old license.[9] However, it was contended by the commission that the regulations only indirectly affected plaintiff's rights, and then only on the contingency of future administrative action, and therefore were not reviewable.[10]

It is true that prima facie the issuance of the regulations may have had no immediate and direct effect upon plaintiff's substantive rights. It was so worded that the apparent purpose was to modify the requirements necessary for the issuance or renewal of station licenses in the future, a fact with which none of the networks had any connection. Even a cursory examination however, of these requirements reveals the repercussions resulting to plaintiff and other networks.[11]

Although in form the regulations may be prospective and not addressed to plaintiff, in substance the networks' contractual relations with affiliated stations suffer a real and present jeopardy, despite the fact that the sanctions of the regulations have not yet been invoked.[12]

In view of the practical application of the regulations, while they may have been declaratory of the commission's future licensing policy, they also constituted an "order" in that they impaired plaintiff's contractual rights and business relations with station owners whose licenses the regulations may cause to be revoked. The threat of injury to plaintiff was already impending at the time the suit was filed in the district court.[13]

It would not seem just to compel plaintiff network to forego the advantages of a judicial review of an order said not to affect it and require it to sit idly by while that same order was undermining its commercial existence by prescribing the kinds of contracts others

9. Instant case at 417, 62 Sup. Ct. 1200.

10. Instant case at 420, 62 Sup. Ct. 1201 (citing cases). This argument found support in the district court, 44 Fed. Supp. 688, 692. "The regulations are nothing more than a declaration—or if one chooses, a threat—by the commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of 'affiliates' meanwhile; their existing contracts with the networks remain enforceable."

11. Instant case at 413, 62 Sup. Ct. 1198. Many of the stations under contract with plaintiff had threatened to cancel their contracts before the regulations became effective, and stations whose contracts had expired refused to enter into new ones for fear of losing their licenses. This uncertainty of contractual relations with affiliated stations also placed plaintiff's contracts with radio advertisers in a precarious position. Advertisers refused to contract sponsored programs with plaintiff until they had some assurance of how many stations were to be affiliated with plaintiff.

12. Powell v. United States, 300 U.S. 276 (1937) (repudiates the suggestion that merely because an order is not in terms addressed to those whose rights are affected, they are precluded from review); Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382 (1932); Western Pac. C. R. Co. v. Southern Pac. Co., 284 U.S. 47 (1931).

13. Note 11, supra illustrates the undercurrent of contractual unrest already caused by the regulations.

could make with it under penalty of license revocation to the one who dared disobey.[14]

BILLS AND NOTES

PAYEE OF PROMISSORY NOTE AS A HOLDER IN DUE COURSE

Defendant executed a note payable to plaintiff or order and delivered the note to A, a stock salesman, to hold on certain conditions. A immediately discounted the note to plaintiff, without indorsement and without defendant's knowledge or consent. Plaintiff, having no notice of any defenses to the note, paid value therefor. *Held,* the payee is a holder in due course of this note, and is free from the defense of want of consideration. *Wabash Valley Trust Co. v. Fisher,* —— Ind. ——, 41 N.E. (2d) 352 (1942).

The issue seems settled that under the common law a payee could be a holder in due course, purely on grounds of negotiable instruments law, *Armstrong v. American Exchange Nat. Bank,* 133 U.S. 433 (1889); *Cagle v. Lane,* 49 Ark. 465, 5 S.W. 790 (1887), although many cases frequently cited in support of this proposition are really decided on grounds of estoppel. *Lucas et al. v. Owens,* 113 Ind. 521, 16 N.E. 196 (1888).

However, with the adoption of the UNIFORM NEGOTIABLE INSTRUMENTS LAW, (1895) UNIFORM LAWS ANN., Vol. 5; IND. STAT. ANN. (Burns, 1933) §§19-101 to 19-1807 (hereinafter cited: N.I.L.), a difference of judicial opinion early arose out of certain provisions, primarily §52(4) (A holder in due course must, among other things, take the instrument by *negotiation* without notice of any infirmity in the instrument or defect in the title of the person negotiating it), and §30 ("An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. . . . If payable to order it is negotiated by the indorsement of the holder completed by delivery").

One of these conflicting rules applies a strict and literal interpretation of the statute, whereby it is generally found that the payee is not a holder in due course. *Davis v. Nat. City Bank of Rome,* 46 Ga. App. 194; 167 S.E. 191 (1932); *Vander Ploeg v. Van Zuuk et al.,* 135 Iowa 350, 112 N.W. 807 (1907); *Long v. Shafer et al.,* 185 Mo. App. 641, 171 S.W. 690 (1914). The basis of this view rests in the interpretation of the requirement of N.I.L. §52(4) that the holder take the note by *negotiation,* which, in the case of an order instrument,

14. Since the overruling of Proctor & Gamble v. United States, 225 U.S. 282 (1912), and the cases following it, the "negative order" doctrine seems to present no difficulty in the present case. Rochester Tel. Co. v. United States, 307 U.S. 125 (1939); accord, United States v. Maher, 307 U.S. 148 (1939); Fed. Power Comm. v. Pac. Power & Light Co., 307 U.S. 156 (1939). For a discussion of the doctrine and the cases in support of and against this now dead doctrine, see Note (1940) 24 Minn. L. Rev. 379. In view of the Rochester case, it is clear that the fact that the regulations in the instant case did not in terms prohibit plaintiff from doing certain acts seems immaterial. Once again the test seems to be one of substance. See note 8, supra.