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Supreme Court of the United States

October Term, 1968

In the Matter of:

----- Docket No. 2

RED LION BROADCASTING CO., INC., etc. et al.

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION et al.

Respondents.

Office-Supreme Court, U.S.
FILED

APR 8 1969

JOHN F. DAVIS, CLERK

Pt. 2

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C O N T E N T S

ORAL ARGUMENT OF:

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Erwin N. Griswold, Esq.
on behalf of Respondents 32

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Roger Robb, Esq.
on behalf of Petitioners 37

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - - x
4 Red Lion Broadcasting Co., Inc., etc. et al. :

5 Petitioners, :

6 v. :

No. 2

7 Federal Communications Commission et al. :

8 Respondents. :

9 - - - - - x
10 Washington, D. C.
11 Thursday, April 3, 1969.

12 The above-entitled matter came on for argument at
13 10:10 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 JOHN M. HARLAN, Associate Justice
18 WILLIAM J. BRENNAN, JR., Associate Justice
19 POTTER STEWART, Associate Justice
20 BYRON R. WHITE, Associate Justice
21 ABE FORTAS, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

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Counsel for Respondents

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 2, Red Lion Broad-
3 casting Company, Inc., et al, Petitioners versus Federal
4 Communications Commission, et al.

5 THE CLERK: Counsel are present.

6 MR. CHIEF JUSTICE WARREN: Mr. Solicitor General.

7 ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

8 ON BEHALF OF RESPONDENTS

9 MR. GRISWOLD: Mr. Chief Justice and may it please
10 the court.

11 Before resuming my argument, I would like to make a
12 reference to one matter to which I referred yesterday afternoon.

13 I raised question as to whether there was something in
14 this exchange of letters between the Commission and the Red Lion
15 Broadcasting which constituted an order, which was properly
16 subject for judicial review.

17 I should point out that the question whether there was
18 something reviewable there was presented by petition for
19 rehearing en banc by the Government, which was joined in by the
20 other side, and my reference there should simply my own personal
21 puzzlement as to what in these days constitutes a proper subject
22 of judicial review.

23 At the conclusion of the argument yesterday afternoon,
24 I was referring to the suggestion that the personal attack
25 regulations would inhibit actions by broadcasters. The

1 inhibition I have suggested lies, the suggestion of inhibition
2 I contended lies in a misapprehension of the status of the
3 broadcaster. It is based on the assumption that every minute
4 of the time available to a broadcast licensee is his to use for
5 his own personal financial profit.

6 And I was arguing that his license allows him to use
7 a public facility, it provides that it must be used for the
8 public convenience and interest, if he doesn't meet the standard
9 of the public interest, the Commission may fail to renew his
10 license, it can even cancel it, and certainly the personal
11 attack doctrine as an aspect of the fairness doctrine does no
12 more than to say that he must use his privilege in this
13 particular circumstance in the public interest.

14 His license comes to him burdened with a public obli-
15 gation and he is in no position to claim that he is inhibited
16 if he is required to make a modest performance on the obli-
17 gation.

18 Experience shows that there is little trouble under
19 the fairness and personal attack doctrines with the great
20 networks and the stations which they control. The problem
21 arises mostly with the small independent stations as in the p
22 present case.

23 As I have already indicated, there is no evidence
24 here, no showing of any hardship or even of loss of revenue by
25 this station. Mr. Robb in his argument yesterday admitted

1 that there was a personal attack so there is no question here
2 about suggested vagueness of the regulation. The only
3 objection that the station made was to the granting of free
4 time. They made no suggestion as to a problem of scheduling.

5 Moreover, as has been indicated, they had a format.
6 They had a free speech hour each week when they could readily
7 have put it in. Indeed many small stations play a great deal
8 of music and an appropriate response to a personal attack
9 could have been put on the air in place of a single recording.

10 The Commission does not undertake to tell the station
11 just where the response must be put, as long as the station
12 shows an effort to be fair the placing of the response is up to
13 it. If it can get a sponsor it is free to do so.

14 Otherwise, it must be on sustaining time. But as I
15 indicated, that is part of the obligation it undertakes when
16 it accepts its license.

17 Q Was that all clear back at the time that this
18 Red Lion episode occurred that it was the obligation of Red
19 Lion to not only to give an opportunity to the person whose
20 character had been attacked, but also do it at no expense to
21 him?

22 A Let me say in response to that, Mr. Justice,
23 that the fairness primer had been published before this. The
24 fairness primer is essentially a digest of previous rulings
25 of the Commission. I think I am right in my recollection that

1 at least one of those rulings involved the question of free
2 time. It was not as explicit as it was in this exchange of
3 letters but I think it is inherent in the fairness doctrine.

4 Q Just glancing through the appendix and I haven't
5 read it carefully, there seems to be an indication that many
6 of these broadcasting companies, and there were a great many,
7 that broadcast this particular speech --

8 A I think there were 165 that broadcast this
9 program.

10 Q -- many of them seem to take the view that their
11 obligation was met by this simple offer of free time if you
12 wanted to pay for it.

13 A Simple offer of time.

14 Q Of time, excuse me. Yes, I beg your pardon.
15 If he wanted to pay for it, or a showing that he was a pauper
16 or something like that.

17 A But let me suggest to you, Mr. Justice, that
18 paying for time on 165 stations is pretty substantial burden
19 to put on the person involved here, particularly when as is
20 our submission, this is really the obligation of the station
21 in meeting the statutory requirement of operating in the public
22 interest of which over the course of a long evolution has
23 developed into the fairness doctrine and more specifically
24 into the personal attack doctrine.

25 Q I understand your submission as to the importance

1 and necessity of its being free time but I -- my question as
2 you understood I know was whether or not that was also clear
3 back at the time of the Red Lion Broadcast.

4 A Not as clear as I would like to have it be.
5 There was no, nothing stated in bold-face type that you must
6 do this on free time if you can't get a sponsor. I think it
7 was understood and I don't think that Red Lion was surprised
8 when the response came from the Commission. Certainly that is
9 a part of the issue here.

10 I should think it would be unfortunate in the long
11 run to have it said that well, you can reply if you can pay
12 for it. Or you can reply if you can get a sponsor. That
13 would seem to be a considerable hindrance on a free speech
14 in the development of robust debate which is the underlying
15 objective of the First Amendment.

16 It is our position that the objective of the fairness
17 primer of the Commission's action here is to implement the
18 First Amendment and not to subvert it.

19 To induce the licensees to recognize their obligation
20 under the amendment since they are utilizing a portion of a
21 public facility, it has been argued that the First Amendment
22 requires an opportunity for response in a situation like this.
23 That, in effect, the United States would be denying free speech
24 if there were no personal attack doctrine. I don't go that far.

25 But I do contend that the regulation here involved

1 on these facts does implement the First Amendment, does protect
2 the public's right to hear, which is the underlying basis of
3 the First Amendment, and tends towards encouraging robust and
4 spirited debate in accordance with the thrust and objective of
5 the First Amendment.

6 And for these reasons we would submit that the
7 decision of the Court of Appeals in this case should be affirmed.

8 MR. CHIEF JUSTICE WARREN: Mr. Robb.

9 REBUTTAL ORAL ARGUMENT OF ROGER ROBB, ESQ.

10 ON BEHALF OF PETITIONERS

11 MR. ROBB: Mr. Chief Justice and may it please the
12 Court.

13 Referring briefly to the statement by the Solicitor
14 General concerning whether or not this was a final order for
15 which I thank him, I think that perhaps I might flush that out
16 a little bit by reference to the records.

17 As had been indicated when this case was first pre-
18 sented in the Court of Appeals, the jury panel consisting of
19 Circuit Judges Miller, Fahy and Tamm. The question was raised
20 as to whether or not the order involved was a final order. At
21 that time the respondent commission was represented by
22 Mr. Geller, its general counsel and by Mr. Assistant Attorney
23 General Turner of the Department of Justice.

24 Judge Miller in his opinion said this, which appears
25 at page 84 of the Joint Appendix: In considering this matter

1 we are confronted by the threshold question, whether the
2 Commission's letters of October 6 and December 9 were final
3 orders from which an appeal may be taken. Pursuant to our
4 invitation, the parties have submitted memoranda on the ques-
5 tion in which they agree that the Commission's letters con-
6 stitute final appealable orders.

7 However, Judge Miller and Judge Tamm held that the
8 orders were not finally appealable. Judge Fahy dissented in
9 which he said all parties including the one against whom the
10 ruling was made, understood the Commission had decided finally
11 that Red Lion was under obligation to comply with the fairness
12 doctrine and had so notified Red Lion.

13 Thereafter, there was a motion for a rehearing en banc
14 in which again the respondent was represented by Mr. Turner
15 of the Department of Justice, and as Judge Tamm points out in
16 his opinion, final opinion, thereafter the United States and
17 the Federal Communications Commission petitioned for a bank
18 rehearing of the case.

19 In other words, as had been pointed out, all parties
20 joined in that petition. And I note in the brief for the
21 Government filed here, at page 9, appears the statement, No. 2
22 hereinafter Red Lion involves a challenge to a 1965 Commission
23 order directing Red Lion Broadcasting Company, Inc., licensee
24 of radio station WGCB in Red Lion to afford time to Fred J.
25 Cook, so I take it there can be no question as far as the

1 Government is concerned this is a final appealable order.

2 Mr. Griswold has made reference to the distinction
3 which he argues between newspapers and radio in the matter of
4 regulation. And he suggests that since radio is subject to
5 some regulation it therefore should be distinguished from the
6 case of newspapers.

7 We suggest that newspapers are also subject to the
8 law, they are subject to the anti-trust laws. They are subject
9 to the obscenity laws perhaps to a certain degree.

10 But that does not mean that the Government may dic-
11 tate what may be published and what may not be published. The
12 newspapers enjoy the privilege of lower postal rates, as do
13 periodicals but this Court has held in the Hannegan against
14 Esquire case, that the fact that these rates are granted to
15 publications as a privilege does not authorize the Government
16 to determine what is in the public interest to be mailed and
17 what is not.

18 Now let me very briefly in connection with newspapers
19 and news stories to the question put to me yesterday by
20 Mr. Justice White and which perhaps at the time I failed to
21 understand fully, or misunderstood.

22 The question as I recall it was, whether or not this
23 Hargis broadcast might have been carried as a bona fide news
24 cast and therefore have avoided the requirement that free time
25 be given for a reply.

1 I think in the first place, if one examines this
2 broadcast, that one must reach the conclusion that under no
3 stretch of the imagination could this be considered a bona fide
4 news broadcast.

5 It is a discussion and an attack on Mr. Cook. How-
6 ever, and this matter is discussed at some length in the brief
7 filed in No. 717 by Columbia Broadcasting System -- however, in
8 the first place under the fairness doctrine and the personal
9 attack doctrine as it then stood at the time of the broadcast
10 there was no exemption for a personal attack carried in a
11 news broadcast.

12 Q This is just under the current rule?

13 A Yes, sir, but even under the current rules, and
14 may it please the court, even under the current rules and the
15 current rule is published at page 20, printed at page 20 of
16 the CBS ---

17 Q It is still subject to the fairness doctrine?

18 A It is still subject to the fairness doctrine
19 unless the broadcast carries some general answer to the attack
20 in some other way.

21 Q Even if he isn't subject to the specific and
22 personal attack rule he is still subject to the generalities of
23 the fairness doctrine and in trying to search out the position
24 and present it?

25 A Yes, sir. And as the Seventh Circuit held in

1 the other case our reading of the latest amendment indicates
2 that unless the response of the person attacked is fairly
3 presented by the licensee on the attack issue of the exempt
4 broadcast, the licensee must adhere to the explicit requirement
5 of the rules so that the exemption is really rather
6 insubstantial.

7 Q What is your client's basic view of the air or
8 the atmosphere through which these waves travel? Is it really
9 public property or does it belong to the people? Some people
10 have suggested it is like a public street.

11 A I beg your pardon.

12 Q Some people suggest it is like a public street
13 that everybody has some right of going into for communication
14 purposes.

15 A Well, even assuming that to be true, may it
16 please your Honor, this Court has held in many cases that
17 although public streets and public parks are public property
18 and held in trust for the public the Government may not under
19 the guise of regulating the use of the streets or parks, impinge
20 upon the right of ---

21 Q That is true. But if they are -- couldn't
22 they insist, if they are going to give people, certain
23 selected people, the exclusive right to use the parks that they
24 let somebody else use them, too, sometimes, under some con-
25 ditions, use the parks or streets or the air waves?

1 A Well, I don't quite follow your Honor's analogy
2 in that connection. It seems to me obviously everybody can't
3 have a license for a radio station because there aren't enough
4 frequencies to go around.

5 Q Well, that is true, and the people they give
6 them to, the Government suggests they ought to be able to
7 require to let somebody else into the facility now and then when
8 there is a good reason to do so.

9 A Well, that may be taken care of by the general
10 fairness doctrine about which I have no comment except to say
11 that there is a distinction I think and a very sharp distinction
12 between a general requirement during the term of its license a
13 radio broadcasting company must observe general fairness and if
14 it fails to do so at the end of its term it might not get its
15 license back.

16 I think there is a distinction between that situation
17 and the situation we have here where the Government undertakes
18 to tell a radio broadcaster what it must broadcast and who it
19 must put on the air.

20 Q I am not suggesting that anything specific about
21 these specific rules, but in principle, do you object to the
22 notion that the Government may ---

23 A I beg your pardon?

24 Q In principle, do you object to the notion that
25 the Government in granting licenses which are available in

1 limited numbers, that they can suggest to the licensees that
2 under certain conditions they must let some other people
3 besides themselves use the facilities?

4 A Well, when your Honor says in principle your
5 Honor makes it rather difficult to answer because the principle
6 might be extended to lengths which I would not be able to
7 accept.

8 Q Well, the fairness doctrine, the general fairness
9 doctrine still just leaves it in the -- as I take it -- in the
10 hands of the broadcaster to decide what material would go
11 over the air waves to create the balance which the fairness
12 doctrine might require; is that correct?

13 A Yes, sir.

14 Q And so I ask you again, would you say that the
15 Government would be disentitled in connection with a license,
16 to require that the licensee allow certain specific material
17 to go on the air waves rather than just leaving it up to him?

18 A I would answer that question no. I think that
19 is what they are doing in this case.

20 Q That is right and you say the public has no
21 right in connection with granting a license to say to the
22 licensee that here is some material that you must broadcast,
23 at some point in your operation?

24 A I don't think I would phrase it quite that way,
25 your Honor.

1 Q If some other members of the public want it
2 broadcast.

3 A Your Honors say the public has no right to hear
4 it. I would say that the Government has no right to dictate
5 to the broadcaster that he must present it to the public in a
6 certain way in a certain time through a certain person.

7 Q So you say that the Government may not say that
8 if John Jones, a member of the public, demands from you under
9 certain conditions that he be allowed to speak on your
10 facilities that you must do so. You would say the Government
11 may not say that?

12 A Yes, sir. I might point out to the Court in
13 that connection with respect to the general proposition of
14 fairness that the record shows here that Red Lion did broadcast,
15 I think half an hour at one time, and 15 minutes at another time,
16 did give to the Democratic National Committee that time to
17 broadcast a general program on what was called Hate Clubs of
18 the Air, which included Mr. Hargis who is involved in this
19 broadcast so the public did have that before it.

20 Q Mr. Robb, may I ask you this. Do you acquiesce
21 in the reasonableness rule, don't you?

22 A Oh, yes, sir. Yes, sir.

23 Q What in principle is the difference between the
24 situation in the case we have here, where they say that the
25 radio station must have, must give free time to someone to

1 answer, on the one hand, and on the other hand, at the con-
2 clusion of the term of the license, the Commission says to
3 them, "Now, here, you haven't been reasonable, you haven't been
4 fair, you have been out of line in what you say is they are
5 using their First Amendment rights and, therefore, we take
6 away your license."

7 Now, what is the difference in principle between
8 those two?

9 A Well, I notice in the brief of the Government a
10 reference to a decision of the FCC in a case in which it was
11 attempted to cancel the license of a broadcasting station on
12 the ground that the station over a period of years had been
13 broadcasting anti-Semitic programs and the Federal Communications
14 Commission held that was not a proper ground upon which to
15 revoke the license.

16 So apparently, and obviously I think, the Federal
17 Communications Commission draws a distinction between such a
18 proceeding and such an attack upon a station, and the case which
19 we have before us wherein a particular case with respect to a
20 particular matter, the station is told that it must broadcast
21 particular material through the voice and from the mouth of
22 a particular individual.

23 Irrespective of the fact that the station may have
24 been overall perfectly fair with respect to the issue discussed,
25 this isolates a particular individual and a particular

1 individual desires from the general question of whether during
2 its term of service the station has been fair and reasonable.

3 Q Is that a question of principle or is that a
4 question of degree?

5 A I think it is a question of principle, your
6 Honor.

7 Q What is the principle?

8 A I think the principle is that the station between
9 dictating a particular program, which I think amounts to
10 censorship and over a period of years passing judgment on
11 whether or not the performance of the station over those years
12 had been fair.

13 I can see a distinction there.

14 Q In other words, it is a distinction between an
15 individual program on the one hand and overall policy on the
16 other?

17 A Yes, I think that is probably what Mr. Chafee
18 had in mind when he wrote his article on this matter in which
19 he said that dictating a particular program, contents of one,
20 is the very essence of censorship.

21 Q You mean to require an answer is censorship?
22 Certainly it doesn't mean that, does it?

23 A I beg your pardon?

24 Q Certainly it doesn't mean to require an answer
25 is censorship, does he? Isn't it something else?

1 A Yes, sir.

2 Mr. Justice Stewart asked the Solicitor General whether
3 or not Red Lion was on notice that it would be required to give
4 free time. While I can't state definitely that it was not,
5 I am advised that there was nothing clearly stated prior to
6 this ruling which put Red Lion on notice that it must give this
7 free time.

8 And obviously many of the radio stations who re-
9 sponded to Mr. Cook felt that their obligation was fully ful-
10 filled when they offered him time on a paid basis.

11 I think unless the Court has some further questions
12 that is all the time that I want to impose upon the Court.

13 MR. CHIEF JUSTICE WARREN: Very well.

14 (Whereupon, at 10:38 a.m. the oral argument in the
15 above-entitled matter was concluded.)
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