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Immunity--The Resolution of a Broadcaster's Dilemma

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IMMUNITY — THE RESOLUTION OF A BROADCASTER'S DILEMMA

In the midst of the recent furor raised by the sudden disclosure of gigantic hoaxes in the television industry, the clamor is heard for more extensive governmental control in the field of broadcasting. The American people have developed a keen awareness of possible misuses of those powerful instruments of communication — radio and television. The necessity for regulation has become obvious; yet, equally obvious is the importance of preserving some semblance of free speech in the broadcasting industries. To protect the interests of the public, while encouraging free and exhaustive discussion of important controversial issues, is a major problem of any regulation in this area. It is this problem that confronted the United States Supreme Court in *Farmers Educational & Cooperative Union v. WDAY*.[1]

The defendant television station permitted a senatorial candidate to broadcast a speech in reply to two previous addresses by candidates for the same office which had been broadcast by the defendant. Before the speech went on the air, the script was submitted to the station. A remark accusing the plaintiff of conspiring to "establish a Communist Farmers Union Soviet right here in North Dakota,"[2] was found in the script, and the candidate was informed that his speech would be broadcast only if he insisted upon his rights to equal time under section 315 of the Federal Communications Act.[3] The candidate insisted, the speech was broadcast uncensored, and WDAY was made a defendant in an action for libel brought in a state district court of North Dakota. That court dismissed the complaint on the ground that section 315 rendered the station immune from liability for defamatory remarks made when the broadcaster was acting in compliance with that section. The Supreme Court of North Dakota affirmed the decision of the district court,[4] and the case was brought before the United States Supreme Court on certiorari "because the questions decided are important to the administration of the Federal Communications Act."[5]

In a five to four decision, the United States Supreme Court affirmed the state court's holding. The majority opinion, written by

1. 360 U.S. 525 (1959).

2. *Id.* at 527.

3. "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting: *Provided,* that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate." Communications Act of 1934, § 315, 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315 (1953).

4. Farmers Educational & Cooperative Union v. WDAY, 89 N.W.2d 102 (N.D. 1958).

5. 360 U.S. 525, 529 (1959).

Mr. Justice Black, held that the prohibition against censorship in section 315 is absolute, that implicit in this prohibition is a grant of immunity from libel actions, and that section 315 has thereby pre-empted state libel laws within its sphere of operation. Mr. Justice Frankfurter, dissenting with three others, agreed that section 315 prohibited censorship, but argued that this prohibition carries with it no immunity, and that it had not pre-empted state libel laws.

Thus, the three major issues discussed and decided by this case become apparent: Are broadcasters permitted to exercise any power of censorship over defamatory remarks contained in the speech of a political candidate? Does section 315 confer immunity upon stations acting in compliance with its provisions? Are state libel laws pre-empted insofar as their applicability to a broadcaster acting under section 315 is concerned?

All the members of the Court concurred on the issue of censorship; they agreed that section 315 must be construed to prevent censoring of materials broadcast under the provisions of that section. In so doing, the Court has provided the only reasonable construction of section 315 which is consistent with the legislative intent to encourage free political discussion and create a more intelligent voting public.[6] Any other construction defeats the very purpose of the provision which prohibits censorship; by forcing stations to make determinations which courts themselves find extremely difficult,[7] essential material would be deleted in order to guard against liability for defamation. The question of what is defamatory in the area of controversial political discussion is complicated not only by the nature of the tort, but also by the defenses of fair comment and truth.[8]

Those courts which have been most reluctant to grant immunity from state libel laws have held that section 315 does not deprive stations of the right to delete defamatory statements, particularly when such statements do not relate to political issues.[9] According to this theory, a station is at fault if it fails to censor libelous remarks, re-

6. *In re* Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948), in which the members of the Federal Communications Commission analyze the legislative history of section 315.

7. "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm. The explanation is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue." PROSSER, TORTS § 92, at 572 (2d ed. 1955).

8. Boyer, *Fair Comment,* 15 OHIO ST. L.J. 281 (1954); Ray, *Truth: A Defense to Libel,* 16 MINN. L. REV. 43 (1931).

9. *E.g.,* Sorenson v. Mood, 123 Neb. 348, 243 N.W. 82 (1932), where it was held that the censorship clause of section 315 applied only to political material and did not prevent deletion of defamatory and obscene matter. *Compare* Josephson v. Knickerbocker, 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942).

gardless of the prohibition found in section 315. If, under this view, the right of censorship be the only basis for denying immunity, the United States Supreme Court has now removed the only barrier to a fair policy by declaring unequivocally that broadcasters have no such right.

In *Farmers Union v. WDAY*, the Court carefully considered the legislative history of section 315, and particularly the failure of Congress to take action upon the holding in the *Port Huron* case,[10] in order to determine whether Congress intended to confer immunity on broadcasters. On the issue of immunity, the majority disagreed with the dissenting opinion. The majority concluded that the ruling of the Federal Communications Commission in the *Port Huron* case, that immunity from suits for libel is implicit in section 315, was the correct interpretation of that section. However, to Mr. Justice Frankfurter, the fact that Congress never took affirmative action on the ruling, and that several efforts to explicitly incorporate immunity into section 315 had failed, indicated that Congress did not intend to confer immunity upon broadcasters.[11] Mr. Justice Black did not ignore this contradiction, he merely interpreted it differently: "In light of this contradictory legislative background we do not feel compelled to reach a result which seems so in conflict with traditional concepts of fairness."[12] This contention is based on more than a mere abstract concept of justice. In some jurisdictions, courts will impose absolute liability upon broadcasters for libelous publications;[13] under other state statutes there may be criminal liability imposed.[14] In the absence of a definite grant of immunity, the broadcaster would be faced with the undesirable alternative of either violating federal law, or bearing the burden of civil or criminal liability imposed by the states. The only safe alternative might be to refuse permission to broadcast to all political candidates.[15]

10. 12 F.C.C. 1069 (1948). The Commission held that the prohibition against censorship deprived the broadcaster of the right to censor any material, and that immunity was implicit in that provision.

11. For the legislative history of efforts to amend section 315 to incorporate the holding of the Port Huron case, see Snyder, *Liability Of Station Owners For Defamatory Statements Made By Political Candidates*, 39 VA. L. REV. 303 (1953).

12. 360 U.S. 525, 533 (1959).

13. Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1954), where a radio station was held liable when a speaker, broadcasting over a national network, inserted a defamatory ad lib remark. In some jurisdictions there must be at least a showing of negligence in order to establish liability. *E.g.*, Summit Hotel v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 143 (1939), where the court held that a station could not be held liable for an extemporaneous remark which could not have been anticipated by the station. *Accord*, Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (1948). See Leflar, *Radio And TV Defamation: Fault Or Strict Liability?*, 15 OHIO ST. L.J. 252 (1954).

14. *E.g.*, N.D. REV. CODE § 12-2815 (1943); ORE. REV. STAT. § 163.410 (1957).

15. There is considerable doubt as to whether this is a real alternative, unless the station is willing to lose its license in order to guard against libel suits. See *In re* Rainey, 3 PIKE AND FISCHER RADIO REG. 737 (1947).