

4425.

INTERSTATE COMMERCE — FOREIGN CORPORATION
BROADCASTING RADIO PROGRAMS IN THIS STATE EN-
GAGED SOLELY IN INTERSTATE COMMERCE.

SYLLABUS:

A foreign corporation engaged in the business of broadcasting radio programs in this state is engaged solely in interstate commerce and exempt from the provisions of the foreign corporation act as contained in Sections 8625-1, et seq., of the General Code.

COLUMBUS, OHIO, July 16, 1935.

HON. GEORGE S. MEYERS, Secretary of State, Columbus, Ohio.

DEAR SIR:—This is to acknowledge your request of recent date for my opinion as to whether or not the National Broadcasting Company is required to comply with the provisions of the foreign corporation act of Ohio as contained in Sections 8625-1, et seq., General Code, in view of their operations in this state as set forth in a memorandum attached thereto, which is in part as follows:

“The only station which NBC operates in Ohio is station WTAM, the transmitter of which is located outside of Cleveland. The physical properties of station WTAM are owned by WTAM, INC., an Ohio corporation, which has regularly paid its taxes to the state of Ohio, all of the stock of which we acquired some time ago. These properties are leased by WTAM, INC. to the NBC which operates the transmitter of the station. Station WTAM is one of the 20 stations located in 14 states which comprise the so-called basic red network of the NBC. For the greater part of the time that these stations broadcast they function as a unit broadcasting network programs, most of which originate in the New York studios of NBC from which point they are transmitted over wire lines of the Bell Telephone System to the various stations comprising the network, each of which, in turn, broadcasts the programs over its own transmitters. The network is oftentimes supplemented by additional stations in other parts of the country and sometimes consists of as many as 64 stations literally extending from ‘coast-to-coast’ and into Canada and to the Hawaiian Islands. Occasionally, a network program is originated in the Cleveland Studios of WTAM, broadcast over WTAM and, simultaneously and as part of the same operation, carried by wire lines of the Bell Telephone System to the

other stations comprising the network, which, in turn, broadcast the program. I think you will agree that when WTAM is engaged in network broadcasting, it is engaged in interstate commerce, whether the program originates outside of the state of Ohio, as it does in the vast majority of cases, or whether it originates in the state of Ohio. In either case the broadcasting of the program by WTAM is an integral and inseparable part of the simultaneous transmission of the program over telephone wires either from a point outside of the state of Ohio or to points outside of the state of Ohio, or both. I think that there is no question but that it would be an unconstitutional restraint upon this interstate commerce for the state of Ohio to require us to secure a license from it for the privilege of doing this business.

There remains the question of the broadcasting of radio programs by station WTAM separably and not as a part of a network. I take it this is the phase of our business which you consider intra-state; and it is as regards it that your letter of January 23rd indicates you are acting under a misapprehension. While I do not grant, as you seem to contend, that assuming these programs were not received outside of the state of Ohio that the broadcasting of them would be intra-state business, the assumption is erroneous as the fact of the matter is that the station is regularly received by large numbers of people in other states and in the Dominion of Canada. As you may or may not know, the station is a high-powered one of 50,000 watts and operates on a so-called cleared channel, i. e., no other station is permitted to operate on the same frequency. As a result, not only does it create electrical disturbances over an area having a radius of approximately 3,000 miles, but its effective service area, i. e., the region within which the station can be consistently and satisfactorily heard and is regularly listened to, extends well beyond the territorial limits of the state of Ohio. This is clearly established not only by engineering information we have gathered by testing the strength of the signal of station WTAM in various parts of the country but by the even more convincing evidence of thousands of letters received from listeners in other states. Not only are these demonstrable facts, but they are facts upon the basis of which our business is conducted. Our advertisers in sponsoring programs broadcast by station WTAM expect to reach with their message all listeners within the service area of the station, both within and without the state of Ohio; and we expect to reach them with our own non-sponsored sustaining programs. These facts must, therefore, be considered in applying a rule of law to them.

In support of the foregoing you may be interested in the results

of a survey of the situation which we have but recently completed, the pending completion of which has been one reason for my delay in going into this matter more fully with you. This survey establishes that station WTAM delivers a signal intensity of one-half millivolt in the States of Pennsylvania and Michigan and the Province of Ontario in addition to the state of Ohio. In this connection you should realize that a single intensity of one-half millivolt is a relatively high standard of reception, being five times that adopted by the Federal Radio Commission last year as that necessary for service in rural areas and being 500 times that which many radio receiving sets are designed to provide satisfactory service. You should also realize that the measurement is only of the so-called ground-wave of the station, in addition to which there is also a sky-wave which makes possible reception at very remote points, as is indicated by the study of mail received from the station. The mail study consisted of an analysis of 24,686 letters received by station WTAM from listeners to its programs during the period February to December 1933. These letters were found to come from 45 of the 48 states of the Union (all except Nevada, Utah and Wyoming), from the Province of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan and from the Hawaiian Islands. In this connection realize how few listeners write letters concerning programs which they hear."

The Foreign Corporation Act, as contained in Sections 8625-1 to 8625-33, both inclusive, General Code, requires all foreign corporations, with certain exceptions, which are doing business in Ohio to be licensed and pay a license fee based upon the number of such corporations' issued shares which are represented by property owned and business done in this state, which fee shall be the same as the fee which a domestic corporation having authority to issue the same number of shares as such foreign corporation has represented in this state, is required to pay on filing its original articles. Section 8625-3, General Code, expressly exempts from the provisions of the Foreign Corporation Act such corporations as are engaged in this state solely in interstate commerce. The section reads:

"This act shall not apply to corporations engaged in this state solely in interstate commerce, nor to banks, trust companies, building and loan associations, title guarantee and trust companies, bond investment companies, insurance companies, nor to public utility companies engaged in this state in interstate commerce."

Your question accordingly is answered by a determination of whether or not the National Broadcasting Company's acts in Ohio constitute engaging solely in interstate commerce. I assume that all the activities and business of this corporation in Ohio consist of those set forth in the memorandum attached to your request hereinabove quoted, viz., the broadcasting of radio programs and presumably engaging in such business as is incidental thereto.

There are numerous decisions of the federal courts which appear to have established the principle that the broadcasting of radio programs, even though such broadcasting may be carried on in a purely local station, constitutes engaging in interstate commerce.

In *Whitehurst vs. Grimes, et al.*, decided by the District Court for the Eastern District of Kentucky September 17, 1927, 21 F. (2d) 787, the headnote is as follows:

"The business of radio broadcasting is interstate, though communication may be intended only for intrastate transmission, and, Congress having covered the field by appropriate legislation, a municipal ordinance imposing a license tax on all persons, firms, or corporations operating a radio broadcasting station, either commercial or amateur, is invalid as a regulation of interstate commerce."

In *United States vs. American Bond and Mortgage Co., et al.* (District Court, N. D. Illinois, E. D. March 1, 1929), 31 F. (2d) 448, the court was concerned with the power of the United States to prevent the defendant from radio broadcasting without federal license under the Radio act of 1927, as amended by the act of March 28, 1928. The opinion of the court contains a table of the different types of areas under average conditions served by stations of various powers during the evening hours. A station of the power of 50,000 watts, which is the power of station WTAM, is shown as follows: "Radius of Area of Very Good Service (City Dweller) 60 miles; Radius of Area of Good Service (Suburban Dweller) 500 miles; Radius of Area of Fair Service (Rural Listener) 3,000 miles; Radius of Nuisance Area, Beyond limits of country." At page 454 of the opinion the court said:

"It does not seem to be open to question that radio transmission and reception among the states are interstate commerce. To be sure it is a new species of commerce. Nothing visible and tangible is transported. There is not even a wire, over which 'ideas, wishes, orders, and intelligence are carried. A device in one state produces energy which reaches every part, however small, of the space affected by its power. Other devices in that space respond to the energy thus transmitted. The joint action of the transmitter owned by one person and the receiver owned by another is essential to the result.

But that result is the transmission of intelligence, ideas, and entertainment. It is intercourse, and that intercourse is commerce. *Gibbons vs. Ogden*, 9 Wheat. 1, 68, 6 L. Ed. 23; *Pensacola Telegraph Co. vs. Western Union Telegraph Co.*, 96 U. S. 1, 9, 24 L. Ed. 708; *Western Union Telegraph Co. vs. Pendleton*, 122, U. S. 347, 356, 7 S. Ct. 1126, 30 L. Ed. 1187; *International Text Book Co. vs. Pigg*, 217 U. S. 91, 106, 107, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103."

In the case of *Technical Radio Laboratory vs. Federal Radio Commission*, decided in 1929 by the Court of Appeals of the District of Columbia, 36 F. (2d) 111, the court commented upon the power of the Federal Radio Commission over station WTRL at Midland Park, New Jersey, which had a maximum power of 15 watts, in the following language at page 113:

"Appellant also contends that the Commission lacked constitutional authority 'to order the station off the air,' and that its refusal to renew the station's license amounts to a taking of property without compensation, and without due process of law.

We cannot agree with this contention. Under the commerce clause of the Constitution (article 1, §8, cl. 3), Congress has power to regulate interstate commerce, and radio communication in general falls within this classification. *Whitehurst vs. Grimes* (D. C.) 21 F. (2d) 787; 35 Op. Attys. Gen. 126; *White vs. Federal Radio Commission* (D. C.) 29 F. (2d) 113; *United States vs. Am. Bond & Mtg. Co.* (D. C.) 31 F. (2d) 448; Davis, *Law of Radio Communication*, p. 29. It may be questioned whether radio broadcasting can in any case be so restricted in practice as to be wholly intrastate in character. It is clear, however, that the broadcasting service of WTRL cannot be exclusively intrastate, for its location is such that its electric waves may cross state lines, and may also interfere with the reception of radio communications from other states."

To the same effect are *Station WBT vs. Poulnot*, 46 F. (2nd) 671, and *Eastern Air Transport, Inc. vs. South Carolina Tax Commission, et al.*, 52 F. (2d) 456. See also Davis on Radio Law, pages 89 and 90.

Under the foregoing authorities, it appears to be clearly established that the activities in Ohio of the National Broadcasting Company in operating station WTAM constitute engaging in interstate commerce, irrespective of whether or not the corporation is using the station to relay programs which are broadcast in New York, to broadcast programs which are relayed by other stations throughout the country or to broadcast programs which are not relayed by any other station. I assume that in connection with the broadcasting

of what may be termed local programs, that is, those which are not relayed by other stations, the National Broadcasting Company contracts with Cleveland corporations in the sale of time on the air. Since the broadcasting itself constitutes interstate commerce, it would appear that the local solicitation of business firms and contracting with such business firms for such broadcasts would be in the same category as the business of conducting the broadcast. I do not perceive how such activities on the part of a radio broadcasting station could be distinguished, for instance, from the activities of a railroad company in soliciting freight or passenger business to be moved in interstate commerce.

In specific answer to your question, it is my opinion that a foreign corporation engaged in the business of broadcasting radio programs in this state is engaged solely in interstate commerce and exempt from the provisions of the foreign corporation act as contained in Sections 8625-1, et seq., of the General Code.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

4426.

APPROVAL, NOTES OF SALEM CITY SCHOOL DISTRICT,
 COLUMBIANA COUNTY, OHIO, \$8,300.00.

COLUMBUS, OHIO, July 17, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4427.

APPROVAL, BONDS OF CITY OF AKRON, SUMMIT COUNTY,
 OHIO, \$45,000.00 (LIMITED).

COLUMBUS, OHIO, July 17, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.